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# The Determinants of Supreme Court Decision-Making: An Ideal Point Analysis

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Anthony Nownes, Major Professor

We have read this dissertation and recommend its acceptance:

John Scheb, Nathan Kelly, Ben Feldmeyer

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(Original signatures are on file with official student records.)

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**The Determinants of Supreme Court Decision-Making:  
An Ideal Point Analysis**

A Dissertation Presented for the  
Doctor of Philosophy  
Degree  
The University of Tennessee, Knoxville

**Colin Ross Glennon**

**August 2011**

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## Dedication

To my parents, Jim Glennon and Rene Rau, any accomplishment achieved by me is done only as a result of the lifelong freedom I was given to pursue my passions by them. Their support in all of my endeavors, in the classroom or otherwise, is sincerely appreciated and can never be repaid. For this I am forever grateful.

To my sister Erin, whose curiosity in life and loyalty to her family is without peers; and to the rest of my family of grandparents, aunts and uncles and cousins who have showered me with more love than I deserve for as long as I can recall.

To Dr. Richard Hardy, the professor at the University of Missouri who first introduced me to thinking about Supreme Court justice voting behavior; his influence on my academic pursuits is seen in any work I produce.

To all of my dear friends; the list of individuals who have inspired me in intellectual thinking, and sometimes acted with me in complete absence of it, is one that is too long to include here. I have had more extremely meaningful friendships than any one man deserves, yet a few have had a particular deep impact on my life. I would like to thank Mike Atkinson, Mike Pratt, Jacob Smith, Reed Birkenholz, Brian Dooley, Grant Sadowski, Kellen Huffman, Jason Meyerpeter, Nick Rees, Cory Matteson, David Harper and even Seth Rollins in particular. Growing up with this group has kept me on my toes and been an adventure every step of the way.

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on several projects, edit my own works, and has provided me with several of the variables made use of herein. We have worked together on countless projects, many that developed into conference papers and beyond, and it is my sincere hope that this alliance continues. His intellectual curiosity and quest for both knowledge and excitement have an impact on any who met him. Dr. Sharma has made my time both personally and professionally at the University of Tennessee quite enjoyable, and for that I am forever in his debt.

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## Abstract

The relationships among governmental institutions are some of the most studied phenomena in political science. Yet these complex interactions remain largely unexplained due to the difficult task of developing accurate measures that lead to quantifiable tests that enhance explanation and prediction. This work centers on the interactions of United States Supreme Court justices with other political actors. The goal of this dissertation is to better understand the relationship between the Supreme Court and its institutional environment. In short, I ask: What factors affect Supreme Court justices' voting decisions?

I approach this question from several different angles while making use of a unique dependent variable—*Yearly Supreme Court justice ideal point*. This variable is a variant of the ideal points calculated by Michael A. Bailey of Georgetown University (Bailey, 2007). My empirical models consider the effects of numerous independent variables on this dependent variable. One of the unique aspects of this study is that it considers the effects of a wide variety of factors purported to affect judicial behavior. There are four main theories of judicial decision-making, and my empirical analyses test notions exported from all of them. In designing and testing my models, I draw especially on the developing approach of new institutionalism—an approach to the study of judicial politics that emphasizes the influence of external, non-judicial political actors on judicial behavior. Ultimately this work will show what factors constrain the actions of Supreme Court justices and to what degree they do so. This research has many implications for larger theoretical concerns of political science, specifically formulating questions about the independence of the judiciary and contains relevant questions for democratic theory as well.

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# **I. Introduction**

### *The Research Questions*

I begin with the assumption, based on previous research, that Supreme Court justices change their voting behavior over time. This point has been repeatedly established in prior judicial behavior literature. While reaffirming this conclusion with superior measures, I will expand this line of research by addressing the question of why their voting behavior changes. Exploring this question is important because it speaks to the general theories of judicial voting behavior, allowing for empirical examinations of each, while ultimately focusing on new institutionalism theories that posit a relationship between the individuals on the Court and other political actors.

The research question at the center of my dissertation is this: What factors affect Supreme Court justices' voting decisions? This question has been addressed by numerous other scholars, but a precise answer remains elusive. To address this question I use a precise measure of judicial behavior as my primary dependent variable—*Yearly Supreme Court justice ideal point*. This variable has gained currency among scholars of judicial decision-making, and I expect to utilize it to its full potential herein. Indeed, one of the foremost contributions of this study is that it uses this novel dependent variable to model judicial decision-making. Another contribution of this study is that it considers a wide range of factors purported to affect Supreme Court decision-making. Among these are external factors such as the behavior of the president and Congress—factors highlighted in new institutionalism. I also thoroughly examine the unique relationship between justices and the presidents that appoint them, attempting to define the ideological link between them and determine how presidents can improve the likelihood of appointing a like-minded justice to the Court.

Additionally, I will address the impact on judicial behavior of other political actors beyond just the president and congress; I will also examine how the behavior of the other Supreme Court justices affects the behavior of individual justices, thus considering the factors highlighted by strategic theories of judicial making. I also examine other political phenomena, such as public opinion, as measured in terms of presidential approval or policy mood. My consideration of these factors will illuminate the nature of the relationships between the judicial branch and other political actors.

Finally, in addition to building and testing a general model of Supreme Court decision-making, I build and test an additional general model designed to address the following question: What factors affect changes in Supreme Court justice voting over time? To address this question I create an additional dependent variable called “drift.” This variable tracks changes in yearly justice ideal points over time. In addressing this question, I will examine the effects of outside factors, intra-court relationships, personal political characteristics, and what judicial scholars call “the acclimation effect” on change.

In the end, I hope that this research will allow me more fully to understand the variety of factors that affect Supreme Court justice behavior. Ultimately, in this dissertation I will attempt to explicate the often complex nature of the interactions between the Supreme Court and other political actors and governmental institutions.

### *Preliminary Review of the Literature*

Describing the state of the judicial politics subfield, Nancy Maveety (2004) reported that there was no comprehensive theory of judicial behavior. “The subfield remains methodologically

divided among attitudinalists, legal traditionalists, and the most recent entrants to the dispute, strategic theorists who utilize the insights of rational choice approach” (Maveety, 2004, 231). Maveety suggests that current judicial scholars are so entrenched in their preferred methodological approach that they seem to dismiss immediately all work done outside of their chosen method. Developing a comprehensive theory of judicial behavior appears unlikely in this environment. In this section, I will very briefly discuss the major theoretical underpinnings of each of the four major theories of judicial decision-making, paying special attention to the scholarly contributions of each to the public law subfield in general, and the study of Supreme Court decision-making in particular.

#### *Four Models of Judicial Decision-Making*

##### *The Legal Model*

The legal model portrays judges as “value free technicians who do nothing more than discover the law” (Maveety, 2004, 2). Because it was the first approach to gain wide acceptance among judicial scholars, the legal model is sometimes referred to as the “traditional model.” According to Wrightsman, the legal model implies that judges interpret the law but do not create it (Wrightman, 2006). The notion that judges follow precedent and the concept that justices remain consistent in their findings based on previous decisions in similar cases, are the linchpins of the legal model (Brisbin, 1996, Segal and Spaeth, 2002, Wrightman, 2006,). This led Sidney Ulmer to refer to the legal model as one that portrays Supreme Court decision-making as “slot machine jurisprudence” (Ulmer, 1974) because judges are viewed as interpreters of law who apply the law in very mechanical fashion; facts go in, you pull the lever, and justice comes out.

The legal model places a heavy emphasis on constitutional and statutory documents in explaining judicial behavior. The legal model suggests that “the decisions of the court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers and/or precedent” (Segal and Spaeth, 2002, 48). Succinctly stated, according to the legal model, judges “interpret the law rather than create the law” (Wrightsmann, 2006, 111).

### *The Attitudinal Model*

The seminal work of the attitudinal approach is Segal and Spaeth’s *The Supreme Court and the Attitudinal Model* (1993). Maveety posits that the attitudinal model is “succinctly summarized as ‘ideology matters’” (Maveety, 2004, 53). Hagle and Spaeth (1991) describe the main assumption of the attitudinal model as such: “the justices’ votes depend on their attitudes and policy preferences” (Hagle and Spaeth, 1991, 119).

According to this model, the most important variable in determining judicial vote choice is the fixed ideological preferences of the justices. The attitudinal approach discounts the importance of external or internal constraints on justices, and posits that vote choices are made according to ideology (Maveety, 2004, 53). The attitudinal model concludes that because of a number of institutionalized factors, justices can sincerely pursue their preferred policy goals. It also posits that judges are not strategic when voting on the merits of a case (Rogers et al., 2006, 5). The crux of the theory presented by Segal and Spaeth is that justices’ decisions are based on the facts of the case (as the legal model posits), but only in light of the ideological attitudes and values of the justices (Segal and Spaeth, 2002).

### *The Rational Choice Model*

Many Supreme Court scholars believe that the attitudinal model is overly simplistic. While critics acknowledge the importance of ideology, they also believe there is more at work in determining justice vote choice. Thus, the rational choice model, sometimes called the strategic model, arose in public law. Maveety attributes this way of thinking to J. Woodford Howard (Maveety, 2004, 228). Howard observed that vote-shifting often occurs among justices. In other words, many justices' change their vote during the process of decision making. If the attitudinal model were correct this would not happen. Thus, "because votes and opinions frequently change in response to intra-court influences, votes and opinions are not necessarily reliable indicators of attitude, ideology, or jurisprudential philosophy" (Maveety, 2004, 233).

The strategic model of judicial behavior has its roots in the theory of rational choice (see: Downs, 1957). This model holds that all actors are self-interested and aim to maximize benefits while minimizing costs. As applied to public law, the rational choice approach suggests that judges have any number of goals, and that any of these can be relevant to explaining their behavior. Intuitively then, the justices understand that to best achieve these goals they must participate in bargaining (Gibson, 1983, Baum, 1994). As Walker notes, "Individual justices cannot achieve their institutional or policy goals by acting alone. Instead, a justice depends on the preferences and actions of other members of the court" (Walker, 2004, 252). Empirically, such behavior has been observed by a number of scholars who note that the votes at conference and the final outcome of Supreme Court cases often are not aligned (Maltzman et al., 2000, Carp et al., 2007).

The strategic model posits that justices bargain with other justices while voting on a case but before the opinion is written to determine what action will best help them achieve their broader objectives. This suggests that a justice may at times vote counter to his/her true ideological preferences in order to achieve those objectives (Wrightsmann, 2006).

### *The New Institutionalism Model*

New institutionalism builds on the rational choice perspective by incorporating the interaction between justices and other political actors. The basic assumptions of new institutionalism are the same as those of the strategic model. However, new institutionalism accounts for a greater number of influences on judicial behavior by accounting for the potential impact of other political institutions on the actions of Supreme Court justices.

One major assumption of new institutionalism is that justices are aware of, influenced by, and perhaps even directed by, the preferences of other political actors. In other words, according to new institutionalism, justices craft their opinions with the actions of other institutions in mind (Gillman, 1999, 30). Epstein and Knight (2004), drawing on new institutionalism, quote Walter Murphy as stating that justices will moderate their behavior to avoid extreme reactions from Congress (Epstein and Knight, 2004). As noted by Andrew Martin (2006), the powers of Congress against judicial activity it opposes are impressive. These powers include the power to impeach and remove justices, to increase the number of justices on the Court, to change federal jurisdiction, and to propose constitutional amendments (Martin, 2006, 3).

It is important to note that the new institutionalism is not incompatible with the attitudinal model. Strategic judges will not necessarily act insincerely; they may still vote consistent with

their preferences with constraints on those votes. Thus, new institutionalism scholars posit that political institutions mediate between judicial preferences and voting outcomes (Maltzman et al., 1999, 47). However, the new institutionalism differs from strategic treatments in that it denies that the behavior of political actors can be explained solely by reference to instrumentalist rational self-interest (Davis, 2004, 318).

### *Linking the Literature to My Dissertation*

Each of the approaches I summarize above emphasizes a set of variables that is purportedly most important in determining judicial behavior. The legal model, for example, identifies precedent as very important. The attitudinal model, in contrast, identifies judges' attitudes as most important, while the rational approach emphasizes strategic considerations. I am most convinced by the new institutionalism approach to explaining judicial behavior. This approach is most useful, I believe, because it considers a wider range of factors influencing judicial behavior than the other approaches. Because it is so important, I will say a few more words about it.

The roots of new institutionalism can be traced back to Dahl (1957), McCloskey (1960) and Walter Murphy (1964). Yet not until much more recently have judicial scholars applied the new institutionalism to judicial behavior in earnest. For example, Rogers Smith argued in 1988 for the reconciliation of behaviorist concerns with a review of the broader political environment that new institutionalism calls for. Hall and Brace (1999) went further, suggesting that the attitudinal model incorrectly treated the Supreme Court as completely autonomous, and suggested the adoption of new institutionalism notions that emphasized how other political actors

are always a constraint on the votes of justices. Maltzman et al. (1999) take a more holistic tack, arguing that new institutionalism can be coupled with the other approaches.

For the preferences of other political actors to be relevant in Supreme Court decision-making there must be evidence that justices are aware of these preferences. While Baum (1997) demonstrated that there was a relationship between Court outcomes and legislative action, it was Epstein and Knight (1998) who determined that justices could be aware of these preferences with relative ease through briefs to the Court. They employed a textual analysis of judicial conference papers to conclude that justices often state their beliefs about the anticipated actions of other political actors in a majority of cases. This finding was further bolstered by Timothy Johnson (2003), who observed that justices consistently seek knowledge of executive preferences.

Additional new institutionalism literature has furthered the examination of the executive-judicial relationship. Scholars have found that presidents seek to move the Court's ideological median at the time of appointment (Krehbiel, 2007), that presidential ideology affects the direction of judicial voting behavior (Martin, 2006) and that the president's approval rating affects voting on executive agency action (Yates, 1999).

A final major theoretical concept under review in this work is the concept of justice "drift." The justice ideal point drift will be measured from their appointing president, their initial scores, and those of other political institutions. Though it was once thought that justices were stable in their preferences, empirical studies of judicial behavior suggest otherwise, "even before hitting their first-decade mark, most justices' fluctuate, leading to a degradation of the relationship between their preferences and their votes" (Epstein et al., 2007, 1486). The implications of ideological drift for this work are many, having a lasting impact of the

relationship between justices and their appointing president, and every other institution that this study will conceptualize. In short, there is now considerable evidence that new institutionalism is a valid approach to the study of judicial behavior. That is the approach I adopt here. However, I design my empirical models to account for variables identified by other approaches as well.

### *Data and Methods*

In this dissertation, I make use of numerous ideal points as variables. For all the political actors for which I calculate this measure, the ideal point is a numeric representation of the actor's stated ideological preferences; it is a relative score of liberalism/conservatism. Here I will use ideal points that are measured as follows: a score of 0.0 represents a perfect "moderate," negative numbers represent more liberal ideal points and increasingly positive numbers represent increasingly conservative ideal points.

### *Michael Bailey's Ideal Points*

My primary dependent variable of interest is *Yearly Supreme Court justice ideal point*. To create this variable I use the judicial ideal point measure created by Michael A. Bailey of Georgetown University. This is the most important variable in this dissertation. Bailey's measure is the best available as each justice is scored on the same numerical plane measured across time and institutions (Bailey, 2007). To account for variation across institutions, Bailey established a data set of presidents and members of Congress stating an ideological preference on issues pertaining to Supreme Court cases. To account for variations across time, Bailey makes use of "cut point" locations and employs Bayesian Markov Chain Monte Carlo methods. As Bailey explains:

“Key to the approach is the use of “bridging” techniques that link actors across time and institutions. To bridge across institutions, I incorporate an extensive and substantially original data set of observations of presidents and members of Congress taking positions on Supreme Court cases (see Bailey and Chang 2001 for a precursor). To bridge across time, I incorporate information on the “cutpoint” location of bills and cases relative to each other and observations of individuals taking positions on cases and votes in the past. The statistical analysis uses flexible and powerful Bayesian Markov Chain Monte Carlo methods” (Bailey, 2007, 432-433).

The scores for all actors and institutions were updated in 2009 *The Constrained Court* by Michael A. Bailey and Forrest Maltzman. Bailey spends considerable time showing the flaws in previous attempts to determine ideal points. He then describes his techniques and explains that his method produces preference estimates that do not exhibit the anomalies found with other widely-used measures. In short, Bailey provides us the best judicial ideal point estimates.

Bailey uses the same basic methods to create yearly ideal points for other political actors as well—specifically, presidents and members of Congress. As I will note below, Bailey’s ideal points are perfect for addressing the questions I address here. While the four major models of judicial decision-making have been quantitatively examined previously, they have not been tested using ideal points that truly allow for comparisons across institutions or time. Indeed, one of the major contributions of my dissertation is that it tests notions derived from the various models of judicial decision-making using complete, accurate, and comparable data.

The Bailey data covers the 1949 through 2007 Court terms, allowing for an examination of 32 justices who served during this time, 27 justices appointed by presidents Truman through George W. Bush and 23 justices from whom complete career data is available. A justice’s voting score in a Court term is matched with the year in which that term begins (normally in October). For example, the 1965 court term runs from October of 1965 to June of 1966. Bailey lists justice scores by calendar year, describing the data as from 1950-2008. Thus, I incorporated these

values into the appropriate Court term listed in the dataset. Also of note, the initial yearly values for Justice Brennan, Justice Harlan, Justice Stewart, Justice Warren, and Justice White were eliminated from the dataset because each heard only a small number of cases in that particular calendar year.

I create career scores by averaging term-by-term values in the Bailey dataset. The values for *Justice career average score* range from -1.94 to 1.13, with a mean of -.118, where liberalism is represented by negative integers and conservatism is indicated by increasingly positive integers. For *Yearly Supreme Court justice ideal point* I make use of the ideal point values that Bailey has provided. These values range from 2.27 to 1.28 and have a mean value of -0.2301. The Bailey career ideal points for all the justices and presidents are listed in Table 4.5 on page 143.

Of particular importance to this study is the fact that Bailey offers compatible ideal points for presidents. In this research I rely on these ideal point estimates of policy preferences of appointing presidents for each justice in the data set. Going forward this variable is referred to as *Yearly president ideal point*. This variable covers presidents from Harry Truman to George W. Bush. In all, the data sets I use contain yearly ideal point measures for the President, each Supreme Court justice, and each member of the House and Senate for the period 1950-2008. In describing the unique process and appropriateness of his measures, Bailey notes that he:

“Achieves interinstitutional and intertemporal comparability by making use of two kinds of external information that do not typically enter into voting analyses. The first is the use of “bridge” observations of actors taking positions on issues before another institution (Bailey and Chang 2001). These bridge observations provide fixed references against which the preferences of actors across institutional boundaries can be judged. The second is use of intertemporal bridges including information about the relationship of vote cutpoints across time and position taking by individuals on earlier votes in Congress and the Court” Bailey, 2007, 438).

For a full explanation of the techniques used by Bailey in creating his ideal point scores, see Bailey (2007).

### *Dependent Variables*

For the major question of this dissertation, *Yearly Supreme Court justice ideal point* will serve as the dependent variable in empirical analyses. This is a yearly score calculated for each justice of the Court for the period 1950-2008. The data are available on Bailey's webpage (<http://www9.georgetown.edu/faculty/baileyma>). In another analysis (which I will describe shortly), I utilize an additional dependent variable—*Baily justice drift score*, which is created by measuring the distance change in *Yearly Supreme Court justice ideal point* from one year to the next. An additional dependent variable—*Baily justice career change*—is created for each justice by subtracting the first *Yearly Supreme Court justice ideal point* from the final ideal point. This variable serves as a measure of career ideal point change on the Court for each justice. Finally, in my last set of analyses I use a dependent variable called *Justice yearly distance score*, to examine the yearly ideological distance between a justice and their appointing president. This variable measures the difference between *Yearly presidential ideal point* and *Yearly Supreme Court justice ideal point*, and represents how far a justice “drifts” from his/her appointing president in a given year. I also make use of *Justice career distance score* as a representation of the same variable during a justice's final term. Other variations of this premise will be used in subsequent models of this variation, but the majority of this dissertation will test theories of judicial behavior with these scores serving as the dependent variable.

### *Selected Independent Variables*

To address my research questions I test several models. My primary independent variable of interest is *Appointing president ideal point*. Bailey attributes a president one ideal point score that is consistent throughout their entire term. In terms of the relationship to an individual Supreme Court justice as the unit of study, this value remains the same for each yearly observation of a justice's tenure, as obviously the appointing president's ideal point at the time of the appointment did not change. This variable is different from the *Yearly president ideal point*, which is the yearly value for whoever is in the white house at that time. This variable will change over a justice's tenure whenever a new chief executive is elected. These variables developed by Bailey are used in all models of this dissertation to avoid scaling problems of ideological preferences that have plagued much research concerned with the relationships between the judicial branch and other actors in the past.

I utilize many other independent variables as well, including *Yearly Supreme Court median ideal point*, *Yearly House median ideal point*, and *Yearly Senate median ideal point*. Considering these independent variables will allow me to explore the effects of non-judicial actors on judicial voting behavior. I will also consider the effects of congressional party make-up by using a variable called *Congress party percentage*. This variable, which is created by dividing the number of Republicans in Congress by the total number of members, is used to determine the strength of partisan control in a yearly measure. This variable is available for the House and Senate. To account for public approval of the president, I will use Gallup poll data for each president in this study to create the variables *Yearly presidential approval rating* and *Appointing president's approval rating*. This second measure of the popularity of the appointing president at

the time of appointment will be used to test theoretical claims that presidential capital affects the type of nomination he can make, while the former serves as a yearly measure of executive popularity and its potential constraint on judicial behavior.

To explore intra-Court influences, I will use two indicators of Supreme Courts ideology. The first is *Supreme Court median* as provided by Bailey. The second is an original variable developed by myself and Dr. Hemant Sharma. This variable is called *Justice-independent Court median*, and is a yearly measure that reflects the median of the remaining justices serving on the Court independent of the justice in question. This score for each justice for every year served offers a methodological improvement over previous scores of Supreme Court medians by removing the justice in question. This variable and a test of its impact on judicial behavior is measured in Model 3.2, with the findings in Table 3.2 on page 78.

Another important independent variable is *Presidential period*. To create this variable I determine each justice's first day serving on the Court. Then I determine when the justice's appointing president leaves the White House. The period during which the justice serves along with his/her appointing president is called the presidential period, and the remaining period is called the "remainder period." For this variable, a value of "1" represents the presidential period and a value of "0" represents the remainder period.

One of my prominent control variables is *Divided government*. This work will define divided government as a split in party control over the White House and the Senate (the two institutions with constitutionally-described roles in the Supreme Court confirmation process). I include this variable in some models to control for the possibility that divided government might preclude a president from appointing a justice whose voting tendencies will match presidential

expectations (Richardson and Scheb, 1993, Johnson and Roberts, 2005). Another control variable is *Presidential party support*. This variable enables me to control for allegiance to a specific political party (as opposed just to allegiance to the appointing president). The need for such a variable is implied when Silverstein and Ginsberg note that “historically, the Court was more closely aligned with the executive branch, and a Court not closely in step with the president’s political agenda was vulnerable to political attack” (Silverstein and Ginsberg, 1987, 375). I control for such generalized “alignment” with the executive branch through this dummy variable. *Presidential party support* is coded “1” for every justice term during which the party of the serving president matches the party of the appointing president, and “0” otherwise.

Next, I attempt to account for the quality of the justice appointed by making use of the numeric representation of the same with the variable *Segal/Cover qualification score*. As reported by Segal and Cover, originally in 1989 but updated and available online currently, the scores are modeled less than the more famous Segal/Cover measure of pre-confirmation ideology of Supreme Court justices (*Segal Cover ideology score*, which I also make use of in several models). Yet they are appropriate in this context as a control for the quality of justices. The qualification score is based on analysis of pre-confirmation newspaper editorials regarding the nomination of each justice. A score of how qualified each justice is pre-confirmation is reported, with “0” being unqualified and “1” being most qualified. *Segal/Cover qualification Score* has a mean qualification score of .811 and a range of .125 to 1.0, and is used in several models in chapter 4.

I also consider the previous experience of justices in terms of participating in the electoral process. *Held Elected Office* is a dichotomous variable where “1” is recorded if the justice ever

serviced an elected position prior to serving on the court or “0” if they have not. For example, Hugo Black served as Senator from the state of Alabama before coming to the court, while justice Alito served positions from district attorney in New Jersey to assistant solicitor general, to a federal circuit court judge, but never served in an elected office. Theoretically, it is argued that presidents would be more familiar with the ideology of those who had held an elected position and thus espoused their beliefs previously, thus I would anticipate less distance between those who had held public office and those that have not. Along these same lines, the variable *Term* is studied as well. It represents the number of terms each justice has served. This variable serves to alert us to the possibility that judicial “drift” is a linear phenomenon, not one impacted by the preferences of other political actors, but rather the justice distancing themselves from the preferences of their appointer the longer they serve on the Court.

This section highlights the most important independent variables that I will make use of for this research. Many other independent variables that may be present in only one model, for example the Stimson *Public policy mood* variable or the *Appointing presidents distance to filibuster pivot*. I also make use of several unique independent variables developed just for this research such as the presidential qualities ranking scores that are presented in Chapter 5. These variables will be described in appropriate detail preceding each individual model if they have not been previously described.

### *Preliminary findings and Expectations*

In this dissertation I expect to find that Supreme Court justice voting behavior is significantly affected by the ideology of their appointing president, the yearly score of the chief executive, and the ideological leanings of Congress and the public. These are my expected findings based on the previous research and my preliminary findings based on the application of Bailey's scores from 1952-2002. Through only 411 observations there is a positive association between Supreme Court justice ideal points and many of the independent variables tested in this model. The role of the president appears to have a significant impact on justice preferences as there is a strong association between the appointing president's ideal point and the current president's ideal point with the justice's ideal point. This preliminary model also reflects an association between the Senate and the public. Interestingly, there was no relationship between the president's approval rating and the justice ideal point. This suggests that it is the president as a political actor that affects the justice's preferences. Oddly there is a relationship directly between the national policy mood and the justices, but it appears to disappear when the president is introduced as a filter of preferences. Each of these findings is further examined and explored using the more complete and methodological developed dissertation dataset described previously.

The secondary research questions described here are central to traditional behavioralist scholars and consistent with the emerging approach of new institutionalism. I expect to find that justices do drift ideologically from their appointing presidents, and that they do so in accordance with their acclimation period, not just as a function of time. I also expect to find that presidents generally are successful in appointing like-minded Supreme Court justices, and that the chances of them doing so are significantly improved when conditions of unified government are present

and when the president's approval rating is high. Finally, I expect to find that the ideology of the appointing president has the greatest impact on judicial voting behavior. I believe my models will show that when other factors are controlled for, the president's ideology is most influential. While I anticipate that many factors will be shown to affect judicial voting behavior (including Congressional ideology, presidential approval rating at the time of appointment, the presence of divided government, the policy mood of the public, intra-court bargaining strategies, and the preferences of other political actors), I will show that the president's ideology is the most important of them all.

### *Relevance to the Discipline*

There is good reason for the bond between a Supreme Court justice and his/her appointing president. This relationship is established institutionally by the rules that govern the judicial selection process. The findings here will not be counter to the assumption of scholars such as Moraski (1999) that find there is a strong relationship between justices and their appointing president. This is observed throughout the justice's life-tenured career. Perhaps more interestingly, the yearly ideal point from the office of the president also has an effect on judicial preferences. The implications of this observation are that justices are not influenced only by the ideology of the president who appointed them, but by the executive who currently fills the oval office as well. This finding is explored further in the models that follow.

There is also a recognizable relationship between the preferences of the public and the preferences of justices. This is represented through this research by both the national policy mood variable and the Senate ideal point. Theoretically this suggests that justices take cues from

the public in determining their own preferences. This finding supports the literature from scholars such as Carp et al. (2007), and McGuire, and Stimson (2004). It also refutes traditional logic that the Supreme Court is an isolated branch of government neither familiar nor beholden with the changing political currents of the public. My examination of public opinion and Supreme Court rulings will show that as Casillas et al. (2011) found, justices are cognizant of avoiding deviant opinions that are too far removed from public preferences, never wanting to risk the level of perceived legitimacy of their institution.

Yet many other questions are raised in this examination, particularly in terms of separation of powers and checks and balances. I will examine whether a president is unilateral in influencing the preference of the justices they appoint. While Congress maintains recognized authority over the judiciary in statutory terms, preliminary findings suggest that Congress does little by way of limiting the president in appointing like-minded justices. Logically, this finding appears to be counterintuitive and will require further examination.

Ultimately my research will aim to answer other questions that will arise as well. Specifically, I will examine those concerns dealing with the freshman effect, and how and why justices who drift away from their appointing president do so. While I observe a strong association between the appointing president and the justice, the data also shows justices static in their yearly ideal point. Isolating the factors causing this drift remains the challenge.

Other issues that remain tangled include the justice's responsiveness to public opinion (do judges reflect it or shape it), the issue of case salience (does the public care about issues where they anticipate a controversial ruling or does a controversial ruling cause salience), the

role of the legislative branch in the process of confirmation (who is on the court) and affecting judicial preferences (once they are serving). Answering these questions, particularly the ideological directional component, remains a challenge for judicial scholars in light of many contemporary findings in public law and this research.

In this dissertation, I provide a contribution to political science in a number of ways. Yet two specific ways will stand out the most. First, I address questions about Supreme Court voting behavior with superior data and measures—data and measures that will better enable me to understand the determinants of judicial behavior. Second, I provide and employ a new variable that can be used to study intra-Court relationships—*Justice-independent Court median*. Overall, this work furthers the new institutionalism approach to judicial behavior by examining the effect of outside actors on the justices' voting behavior. Nonetheless, I am not singularly beholden to the assumptions of new institutionalism. Rather I aim to incorporate elements of each of the major approaches to the study of judicial behavior to develop a model that answers the biggest question of all that I address in this dissertation: What factors affect Supreme Court justice voting decisions?



## I I . R e v i e w o f t h e L i t e r a t u r e

Nearly 30 years ago, James L. Gibson embarked on the substantial undertaking of examining the development of theory in the study of judicial behavior (Gibson, 1983, 7). While there was agreement that Pritchett (1948) had ushered in the modern era of judicial behavioral research, where the intent was to understand judicial decision making, Gibson found there had been little success in integrating different approaches into one single comprehensive theory. Gibson noted that “comprehensive theory could best be developed through models that incorporate influences stemming from various levels (groups, institutions, environment) but that ultimately focused on the individual” (Gibson, 1983, 7). Theories of judicial behavior needed to become more complex in order to achieve the scientifically valued ability to increase both explanation and prediction.

Describing the state of the field over twenty years later, Nancy Maveety (2004) similarly reported that there was still no comprehensive theory of judicial behavior. “The subfield remains methodologically divided among attitudinalists, legal traditionalists, and the most recent entrants to the dispute, strategic theorists who utilize the insights of rational choice approach” (Maveety, 2004, 231). Maveety suggests that current judicial scholars are too limited in their preferred methodological approach, so much so that they seem to dismiss immediately all work done outside of their chosen method. Developing a single comprehensive theory of judicial behavior appears unlikely in this environment. It is the aim of this work to be part of the solution to this unfortunate problem.

The study of judicial behavior is a major component to the political science subfield of “public law.” Public law has long held a tenuous position in political science as at times it has been considered an odd fit, particularly as the field has aspired to be more scientific in an approach that favors explaining judicial behavior while remaining cognizant of traditional legal

norms and structures (Maveety, 2004, 3-7). Within this complex context, four major theories of evaluating, explaining, and predicting judicial decision making have emerged.

This dissertation will discuss the contributions of each of these models to the public law subfield, specifically as each is applied to the explanation of decision making at the United States Supreme Court. The aim of this work is to answer Gibson's challenge of developing a comprehensive theory of judicial behavior by developing a model of judicial decision making that accounts for each of the major theoretical explanations. I propose to meet Maveety's concerns by developing a model that is not beholden to the assumptions of one particular judicial decision-making theory. By not viewing approaches to public law as a zero sum game, and through the introduction of superior dependent variables, this work will develop a model of Supreme Court decision-making that is best suited to increase the behaviorist's desired outcomes of increased accuracy in explanation and prediction.

Yet this work would not be complete were it not for a complete review of the theories that precede it. Understanding these models and how judicial scholars build upon each of them is essential in the development of any new model. There are many judicial decision-making theories for the consideration of public law scholars, but consistent with other work in the field, this dissertation divides these theories into four main approaches.

The legal model relies on the justices to follow precedent as the predictor of judicial behavior. Conversely, the attitudinal model focuses solely on the preferred ideological positions of justices to predict their vote. The strategic model presumes that each justice is a rational actor and that strategic interaction among members of the court explains their behavior. Finally, the

new institutionalism model explores the relationship between justices and other governmental institutions, such as Congress, the president, and the public, to reach conclusions regarding judicial behavior. Each provides different explanations for behavior of Supreme Court justices.

My research reflects the assumptions of each of the four main approaches to judicial behavior. This work will address this complex issue of determining factors for judicial decision-making through the use of an individual ideal point as the dependent variable. This is the most important concept to precisely define for my research.

Ideal points have been prominently featured in many different works of political science; essentially the ideal point for any political actor is the ideological point where the subject is in 100% agreement with a proposed policy. As is the case in this work, typically these measures fall on a plane scale, with increased liberalism represented by larger negative values and increased conservatism represented by increasingly positive integers. The further one falls from 0, the more extreme the score is to be considered. For example, in 1988 president Reagan (1.64) is said to have a more conservative ideal point than 1989 Bush (0.81). Justice Hugo Black in 1955 with an ideal point of -2.05 is said to be far more liberal than Justice Blackmun in 1990 when his ideal point was -0.55. The range of the ideal points examined in this study is -2.34 - 1.01.

This dissertation makes use of the ideal points prepared by Michael A. Bailey of Georgetown University in his 2007 article in the *American Journal of Political Science*. Bailey's measures appear to be the most accurate due to the methods used to create the ideal scores (Bailey, 2007). The major advancement made by Bailey compared to previous attempts at

establishing the ideal points of political actors is that Bailey determined individual ideal points by using “bridging” techniques that link actors across time and institutions. Previously ideal points had been established simply by taking a snap shot of actors at a given time and only in relationship with others serving in their same institution. To cross institutions, Bailey developed data from presidents and members of Congress taking a stance on the outcome of Supreme Court cases. To accurately compare actors across time, he used “cut point” locations and employed Bayesian Markov Chain Monte Carlo methods. For a full explanation of the techniques used by Bailey in creating his ideal point scores, see: Bailey (2007). (The scores for all actors and institutions were updated in 2009 in *The Constrained Court* by Michael A. Bailey and Forrest Maltzman).

Yet before any statistically driven model gains relevance, we must understand the theory that has preceded it. While not entirely linear in development, the main approaches to judicial behavior have advanced within a measurable time frame. Thus, we start chronologically with an examination of the legal model.

#### *Four Models of Judicial Decision-Making*

##### *The Legal Model*

Early study of judicial behavior presented justices as actors not driven by political motives, but rather as individuals who were passive, impartial jurists, who aimed to uphold *stare decisis* and deliver outcomes that were good, moral, and just. The legal model portrays judges as “value free technicians who do nothing more than discover the law” (Maveety, 2004, 2). As the first approach to gain wide acceptance among scholars, the legal model is sometimes referred to

as the traditional model as well. According to Wrightsman, the legal model implies that judges interpret the law, but do not create it (Wrightman, 2006). Following precedent, the concept of justices staying consistent in their findings based on previous decisions in similar cases, is the linchpin of the legal model (Brisbin, 1996, Segal and Spaeth, 2002, Wrightman, 2006). This led Sidney Ulmer to famously refer to the legal model as “slot machine jurisprudence” (Ulmer, 1974) because judges were described as simply interpreting law and applying it in a very mechanical fashion.

Theoretically, the traditional approach places a heavy emphasis on constitutional and statutory documents for explaining judicial behavior. The legal model posits that “the decisions of the court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers and/or precedent” (Segal and Spaeth, 2002, 48). Succinctly stated, in the traditional approach judges “interpret the law rather than create the law” (Wrightman, 2006, 111). The legal model stipulates that judges use traditional legal reasoning in the process of reaching their decisions. Carp et al. (2007) describe the nature of the legal reasoning process at the heart of jurisprudence in America as a three step process devoted to *stare decisis* where “(1) similarity is seen between cases; (2) the rule of law inherent in the first case is announced; and (3) the rule of law is made applicable to the second case” (Carp et al., 2007, 405).

This model of judicial behavior first came under fire during the behavioral movement in political science, yet remains dominant in the American public’s idea of judicial behavior. Perhaps this is because, as Scheb and Lyons (2000) found, the American public remains supportive of what they called “The Myth of Legality,” the idea that judicial decisions are based

on autonomous legal principals and that legal rules are applied through a politically and philosophically neutral process of legal reasoning (Scheb and Lyons, 2000). Thus, despite many criticisms of the legal model that the behaviorist revolution in political science uncovered, it is important for legal scholars to remember that the general public, those who form public opinion, believe in the assumptions and conclusions of the legal model of judicial decision-making and support this approach in both practical and normative terms.

The questions raised by the behavioral movement led to several more relaxed versions of the legal model. While acknowledging the presence of other factors, these works argue that legal frameworks still guide decision-making and that precedent serves as a substantial constraint on Supreme Court justices (Richard and Kritzer, 2002). The most common contemporary manifestation of the legal model is referred to as “role theory.” Maveety explains that justices have certain ideas about what it means to be a justice and that these ideas will affect behavior. She notes that “judges normative beliefs about what they are *expected* to do either act as a constraint on judicial attitudes or directly affect judicial behavior (Maveety, 2004, 206). Quoting Gibson, Scheb et al. (1989) stated that role theory was “a means of moving beyond an exclusive focus on individuals to consider the influence of institutional constraints on (judicial) decision-making” (Scheb et al., 1989, 427). These authors found that judicial role orientations often served as a filter between judge’s ideological preferences (to be discussed in the attitudinal model) and final judicial outcomes. While this discussion begins to expand outside of the traditional model, role theory is still rooted in classical legal reasoning, and reflects a more modern take on the traditional approach.

In terms of scientific methodology, the traditional approach leaves much to be desired. The most common criticism is that there are no falsifiable hypotheses (Segal and Spaeth, 2002). A traditionalist would proclaim reference to precedent in the justice's written opinions as proof of the justice's adherence to precedent. However, when tested empirically the legal model has failed. Perhaps most damaging, Segal and Spaeth found in a review of landmark cases that Supreme Court justices are not influenced by precedent with which they disagree (Segal and Spaeth, 1999). Simply stated, we can't know if judges followed precedent, because that is the job in their individual interpretation of role orientation, or if they were influenced by any number of outside factors, including their own ideological preferences, and the judge only found precedent afterwards as an explanatory tool to satisfy the known public preference for judicial activity as described by the legal model (Scheb and Lyons, 2000, Carp et al., 2007).

Richards and Kritzer (2002) similarly analyzed voting patterns of justices within certain legal frameworks imposed on the justices as the traditional model predicts. They found that while attitudes matter, they are constrained by formal and informal guidelines (Richards and Kritzer, 2002). This study famously illustrated that judicial scholars had become frustrated by the assumptions of the legal model and that other factors had to be considered to predict judicial outcomes beyond the formal institutional role of the court advocated by traditional theory.

Another flaw of this approach is that precedent can be interpreted in numerous ways. In cases before the Supreme Court, lawyers from both sides are able to cite precedent. Simply following *stare decisis* as the theory suggests would leave the Supreme Court unable to render a verdict. Segal and Spaeth buttress this position by pointing out that precedent and its interpretation can be found on any side of legal arguments (Segal and Spaeth, 2002).

Finally, Wrightsman wisely points out that if justices were actually following the traditional approach then all opinions would be unanimous, as precedent would guide each justice to the same conclusion (Wrightman, 2006). This would reflect the sort of mechanical justice that Ulmer declared the legal model required. Empirically, we have observed that this is not the case. The majority of cases do not end in unanimous verdicts, despite the court's obvious incentives to do so (sends a stronger message to other actors, makes the ruling seem less susceptible to further institutional challenges, etc...). Ultimately, empirical tests reveal that the traditional approach falls short of Gibson's call for increased levels of explanation and predictability for theories of judicial behavior. Because the legal model cannot differentiate among different types of behavior by Supreme Court justices, and because empirically it has offered no quantitative analysis to support its conclusions, scholars must consider alternative approaches of explanation to determine the factors that influence Supreme Court decision-making.

### *The Attitudinal Model*

The flaws of the legal model coupled with the behavioral revolution in political science led public law towards the attitudinal model. Some scholars still refer to this approach as the behavioral model, a reference to its origins in the larger revolution of political observation. The seminal work of this approach is Segal and Spaeth's *The Supreme Court and the Attitudinal Model* (1993). Yet the origins of the theory that justices' ideological preferences and attitudes matter most in predicting their behavior predate this work by some time. Maveety explains that

the attitudinal model is “succinctly summarized as ‘ideology matters’” (Maveety, 2004, 53). Further, Hagle and Spaeth (1991) describe the main assumption of the attitudinal model: “the justices’ votes depend on their attitudes and policy preferences” (Hagle and Spaeth, 1991, 119).

In short, the most important variable in determining judicial vote choice is the fixed ideological preferences of the justices. The attitudinal approach discounts the importance of external and internal constraints on justices, and posits that vote choices are made according to ideology (Maveety, 2004, 53). According to the attitudinal model, because of a number of institutionalized factors justices can sincerely pursue their preferred policy goals and need not worry about acting strategically when voting on the merits of a case (Rogers et al., 2006, 5). The crux of the theory presented by Segal and Spaeth is that justice’s decisions were based on facts of the case (as the legal model posits), but only in light of the ideological attitudes and values of the justices (Segal and Spaeth, 2002). Thus, the attitudinal model does not necessarily replace the traditional approach entirely, but rather builds on it by adding more accurate assumptions and increasing the ability for quantitative testing that improves the ability of models to predict future judicial outcomes. These major findings are supported by numerous subsequent researchers (see: Clayton and Gillman, 1999, Wrightsman, 2006).

Credit must first be extended to early judicial pioneers like C. Herman Pritchett who added quantitative methods to the study of judicial behavior and concluded that justices were motivated by their own preferences. For Pritchett, adherence to precedent was nothing but a smokescreen to hide attitudes and policy preferences. Justice’s positions could be primarily explained by their personal attitudes and ideologies (Pritchett, 1949, Baum, 2004, Epstein and Knight, 2004, Maveety 2004). The work of Glendon Schubert warrants mention as well; some

scholars have referred to him as the “father” of the attitudinal movement due to his use of statistical models to determine justice preferences in ordinal fashion (Benesh, 2004, 116). The models were not complex by today’s statistical standards, but were an important step in establishing a quantitative element to both the attitudinal approach and public law as a discipline.

The work of David Rhode was also germane in leading to the 1993 apex of the attitudinal model. Working with Spaeth, Rhode found that the only rational action for justices was to allow their attitudes and preferences to determine their vote choice (Rhode and Spaeth, 1976). This was the result of the institutional characteristics of the Supreme Court, including the lifetime appointments, lack of accountability to the electorate, no higher court to reverse decisions, and control of the case docket (Rhode and Spaeth, 1976; Segal and Spaeth, 2002). Rhode’s findings established the baseline from which Segal and Spaeth could develop their theory. Yet to satisfy concerns of scientific legitimacy, the authors needed a new dependent variable, one that would avoid the problem of circular reasoning that resulted from basing judicial preferences off of written opinions and then applying those observed preferences to predicting future opinions.

The major methodological advancement that Segal and Spaeth contributed was providing an independent score of justice ideology separate from votes on cases. This breakthrough began in the 1989 work by Segal and Cover where the authors applied liberal-conservative scores to justices based on pre-confirmation newspaper editorials. Using logistic regression, Segal and Spaeth matched these scores with liberal/conservative voting patterns (Segal and Spaeth, 2002, 322). Today, any serious work in judicial politics takes some measure of justice ideology separate from votes to avoid the problem of circularity, (in this dissertation our measure is the justice ideal point). This reflects what Maveety described as the major distinction between the

traditional and behavioral approaches, an emphasis on quantitative assessments of behavior (Maveety, 2004). According to the attitudinalists:

“Once justice’s ideological positions were identified and scaled, their votes could be easily quantified. Judicial attitudes served as the predictor of judicial votes, with aggregate data analysis of the patterns that emerged used to validate these claims” (Maveety, 2004, 230).

*The Supreme Court and the Attitudinal Model* (1993) provides strong statistical support for this theory’s conclusions. The authors accomplished this by measuring the justice’s ideological preferences that provided a measure independent of justice votes (see Segal and Cover, 1989). Analyzing this seminal work, scholars observed that Segal and Spaeth had discovered that justice voting was consistent over time and that their preferences in voting corresponded with their ideological preferences (Clayton and Gillman, 1999). Attitudinal scholars are not concerned with legal precedent or strategic action within the court. They posit that judicial voting patterns reflect an individual justice’s ideological preferences only (Segal and Spaeth, 2002, Wrightsman, 2006).

Criticisms of the attitudinal model have focused on the definitive nature of the assumption that ONLY attitudes matter to predict judicial behavior. Present studies of judicial politics concede that attitudes play a factor in the voting preferences of justices, but critics suggest that the attitudinal model doesn’t account for all the factors necessary for a complete model of judicial behavior. As Carp et al. (2007) point out, to assume that justices would consider ONLY their attitudes in voting in a case is naïve of us, or assumes the justices themselves are quite naïve. Justices know that their decisions will be affected by other actors,

particularly in terms of policy implementation, and consider this in making their vote choice (Carp et al., 2007).

There are numerous other critiques of the behavioral approach and the methodology used in the attitudinal model, particularly in the determination of independent ideological scores for judges. Starting with questions of the validity of the Segal-Cover scores, critics responded that relying on newspaper editorials does not provide accurate independent measures of ideology that the authors wish us to believe (Clayton and Gillman, 1999). This charge has been one that is difficult to contend with for the attitudinal scholars, and though this is not a dissertation dedicated to the attitudinal model, it is the reason for the lengthy explanation of the data and methods chosen for this research.

Further, “some literature has argued that the attitudinal model is relevant only to the final vote” (Hammond et al., 2005, 47). This concern for skeptics is that there is a great amount of strategic interaction among the justices throughout the entire process of decision-making, and the attitudinal approach only examines the very last vote. Benesh (2004) explains another deficiency by pointing out that the attitudinal model cannot account for unanimous cases, as all the judges do not share ideological predispositions (Benesh, 2004). (Note for the reader: unanimous cases are consistently a cause for concern for judicial theories as we have noted the opposite concern over them in the traditional approach; this dissertation will aim to develop theory where unanimous cases are consistent with the rest of the model).

Finally, the original authors of the breakthrough independent measures, Segal and Cover, concede that the attitudinal model, with an emphasis on correlation but lacking controls, does not

consider the other influences on the court (Segal and Cover, 1989). This applies to both internal bargaining and external pressures that the court faces. Despite these concerns, the behavioral approach has advanced public law methodology significantly by providing hypothesis that were falsifiable, making use of independent measures as dependent variables, and statistically with the use of logistic regression. This approach to date enjoys the broadest empirical support of the four discussed herein. Yet the attitudinal approach fails to consider the influence of outside actors on the court, the institutional constraints on judicial outcomes, and the internal bargaining that takes place within the judicial conference at the Supreme Court. The next theories discussed in this work aim to correct these shortcomings.

In this research, I make use of the major assumption of the attitudinal model that attitudes matter, and that judges will vote to further the policy that reflects those preferences. However, this research stops short of claiming that's the end of the story. This dissertation also accepts assumptions of the following two theories of judicial decision-making to determine what outside factors most influence the justices in formation of those attitudes.

### *The Rational Choice Approach*

While an improvement on the traditional approach to judicial politics, many Supreme Court scholars felt that the attitudinal model was an oversimplification of the process. Critics acknowledged the presence of ideological preferences in determining a justice's vote choice, but suggested that the attitudinal model was still short of being a comprehensive explanation. Thus, the rational choice model, sometimes called the strategic model, arose in public law. Maveety

attributes the rise in this line of thinking to J. Woodford Howard (Maveety, 2004, 228). Howard observed that vote shifting occurred, meaning that justices were seen to change their vote during the process of decision-making; if the attitudinal model were correct this would not be seen. Stated succinctly, “Because votes and opinions frequently change in response to intra-Court influences, votes and opinions are not necessarily reliable indicators of attitude, ideology, or jurisprudential philosophy” (Maveety, 2004, 233).

The strategic model of judicial behavior has its roots in the economic model of rational choice theory (see: Downs, 1957); all actors are self-interested and aim to maximize benefits while minimizing cost when faced with choices. As applied to public law, judges are rational actors that have any number of goals, and that any of these can be relevant to their behavior. To best achieve these goals, justices participate in bargaining (Gibson, 1983, Baum, 1994). As Walker notes, “Individual justices cannot achieve their institutional or policy goals by acting alone. Instead, a justice depends on the preferences and actions of other members of the court” (Walker, 2004, 252). Empirically, this assumption has been observed by a number of scholars who found that votes at conference and the final outcome of Supreme Court cases often are not aligned (Maltzman et al., 2000, Carp et al., 2007).

The strategic model posits that justices bargain with other justices to determine what action will best help them achieve a broader objective. This suggests that a justice may at times vote counter to their true preference in order to achieve those objectives (Wrightsmann, 2006). This finding of “damage control voting” is exemplified by justices voting against their true “attitude” in order to join the majority, with the hope of moderating how the opinion is worded

(Arrington and Brenner, 2004). This sort of behavior is often studied by judicial scholars who examine the Court through the lens of small group analysis (see: Carp et al., 2007).

The strategic model also accounts for the importance of the opinion, as it is the opinion that ultimately affects policy (Johnson et al., 2005). Small group analysis reveals that justices are highly incentivized to be in the majority coalition, as this coalition will ultimately write the opinion of the court that will become law (Carp et al., 2007). Due to rules that govern opinion writing, being in the majority is in the best interest of the strategic justice aiming to influence policy toward their preference, even if initially participating in the dissent is more ideologically aligned with the justice's true preferences. Similar studies have focused on the specialized role of the chief justice in collegial courts. The most important of these unique powers for the chief justice is thought to be opinion assignment (Carp et al., 2007). Studies of conference votes reveal chief justices "passing" when it is his turn to vote to strategically determine where it is best to assign the opinion to further his own policy preferences (Johnson et al., 2005).

To account for these internal and external influences on judicial decision-making, scholars have continued to turn to the rational choice approach. The seminal work of rational choice theory and judicial behavior is Epstein and Knight's *The Choices Justices Make* (1998).

Their account of judicial behavior states:

"Justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (Epstein and Knight, 1998, 10).

This work summarizes strategic models as those that posit that justices will pursue their preferences, but they are limited in their ability to do so by the institutional nature of the decision-making process of the Court. This approach to judicial behavior seems to account for the main deficiencies of the attitudinal model by assessing the ways that a justice's vote may change in the decision-making process (as Howard and Murphy observed over 40 years ago). In defining the strategic account, the authors have three conditions: "(1) social actors make choices to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made" (Epstein and Knight, 2004 in Maveety, 2004, 200).

Wrightsmen (2006) builds upon this explanation by describing the concept of strategic voting. This is similar, but not identical, to the observations of Carp, et al. (2007). He finds that when a justice votes strategically it is toward the achievement of long term goals, but not necessarily motivated by policy preferences (Wrightsmen, 2006, 132). The author adds that there are many causes of complex behaviors such as voting. Hammond et al. (2005) then summarize that strategic models do not completely discount the assumptions of the attitudinal model, just that the rational choice approach allows for a more complete inquiry into judicial behavior. Speaking about shortcomings of the attitudinal model, Epstein and Knight's work "claimed that justices have to be rational in all aspects of the Court's decision-making process if they are going to pursue their most preferred policies (Hammond et al., 2005, 58). Again, these works feature leading scholars of an approach to the study of judicial decision-making who are producing work that expands upon the initial assumptions of the attitudinal model.

Methodologically, the rational choice approach has enjoyed a vast amount of success in public law after lying dormant for years before *The Choices Justices Make* led to a rebirth of strategic models to explain judicial behavior (see: Arrington and Brenner, 2004, Maltzman, 2000, Richards and Kritzer, 2002, Bonneau et al., 2007). All of these rational choice theorists agree that the opinion is the most important aspect of judicial behavior; after all it is the opinion that sets policy (Spriggs et al., 1999). If Supreme Court justices were acting rationally there would be bargaining on the Court in terms of opinion assignment, voting coalitions, and reworked drafts of opinions due to group negotiation. Each of these activities has been observed (Epstein and Knight, 1998, Spriggs et al., 1999, 503, Maveety, 2004, 231).

One unique aspect of many rational choice models is their use of inside information from justices. Hammond et al. (2005) explain how Murphy used the justice's personal papers, biographies, and court records to analyze the process affecting vote choice through all the conferences to the final vote (Hammond et al., 2005, 29). Epstein and Knight relied heavily on the notes of Justice Brennan to study the entire 1983 term, and used the notes from several justices who served on the Burger Court (1969-1985). The authors found this technique appropriate, as it allowed them to test strategic interaction in an individual term and across landmark cases of one court "era" (Epstein and Knight, 1998, xv). What emerges is that Supreme Court justices base their actions at least in part based on their expectations of how other actors will behave, within the court and other governmental institutions. A strategic goal orientated justice pays attention to the expected actions of other actors when considering their final and most important act of individual choice; their vote. Epstein and Knight make use of frequency

tables to present this information but unfortunately lack control variables in their analysis (Epstein and Knight, 1998, 74, 78, 91).

Finally, in building a strategic formal model toward Supreme Court decision-making Hammond et al. in 2005 used all the analysis available to date and arrived at four main assumptions for their model that reflect the current assumptions used by all rational choice scholars of public law. First, each justice has preferences over the legal policies that might be considered by the Supreme Court on each case. Second, each justice has a most preferred policy among the legal policies that the Supreme Court might consider on each case. Third, each justice's sole objective is to have the Supreme Court adopt a policy as close as possible to his or her most preferred policy on each case. Fourth, each justice pursues his or her most preferred policy on each case in a strategically rational manner (Hammond et al., 2005, 79).

The strategic approach to judicial behavior today reflects these assumptions based on the work of previous rational choice theorists that caused the field to arrive at this standard methodological premise. Yet, there are criticisms of this approach just as there were the others. Perhaps the largest concern for rational choice theorists is that many of the studies feature sources of precise moments and interactions. Relying only on the justice's notes to determine models of strategic action on the Supreme Court creates many questions about the external validity of the findings of Epstein and Knight and other prominent strategic theorists. Although the empirical findings of the strategic model have been consistently observed, this particular critique has been difficult for rational choice scholars to overcome.

The main criticism of the strategic theory is that the model only accounts for the dynamics of the inner workings of the court. The sort of bargaining that Epstein and Knight test empirically is present, but what about external pressures? Also, the works of Arrington and Brenner (2004), Johnson et al. (2005) and Carp et al. (2007), among others, rely on concepts like “bargaining” and “passing” which are hard to define in terms specific enough to uphold the scientific method. It is with these main criticisms of rational choice models in mind that the new institutionalism theory developed.

New institutionalism is an approach that is founded from the same assumptions as rational choice theory where justices act as self-interested actors. Yet, it accounts for the influence of external pressure of other political actors (Congress, the president, interest groups, the public, etc.). New institutionalism also makes use of more advanced statistical tools, formal models (Bonneau et al., 2007), multiple regression (Krehbiel, 2007), and previously discussed ideal points (Bailey, 2007). These models provide more external validity than the rational choice models advanced by Epstein and Knight, and reflect the methodological advancements of the public law subfield.

### *The New Institutionalism Model*

New institutionalism builds on the rational choice perspective by accounting for the presence of interactions between justices and other political actors. Assumptions of the strategic model where justices act as rational actors remain the same in new institutionalism, but the latter extends the number of those interactions. This dissertation aims to continue in this tradition by

building on all of the previous theories in public law, yet at its core this research does fully embrace the new institutionalism model.

One major assumption of new institutionalism is that the justices are politically aware of, influenced by, and perhaps even directed by the preferences of other political actors. Justices then craft opinions of the court with actions of other institutions in mind (Gillman, 1999, 30). Examples in the literature are noted when Epstein and Knight quote Walter Murphy as having written that justices will be willing to moderate their views to avoid extreme reactions from Congress (Epstein and Knight, 2004). Another example, as noted by Andrew Martin, is that the powers of Congress against judicial activity to which it opposes are impressive. These powers include the power to impeach and remove justices, increase the number of justices on the court, change federal jurisdiction, as well as propose constitutional amendments (Martin, 2006, 3). Remembering that Congress maintains the ultimate control over the judiciary, particularly in terms of jurisdiction, is an important note for readers of new institutionalism scholarship (Carp et al., 2007).

Determining the origins of new institutionalism scholarship is more difficult than with other approaches. Perhaps the seminal work is *Supreme Court Decision-Making: New Institutional Perspectives* (1999) by Cornell Clayton and Howard Gillman. Yet these authors do not claim to be the patriarchs of the approach. They quote Cushman (1925) as declaring that the Supreme Court does not work in a vacuum, and that the decisions of the court could only be understood in the context of the history, politics, and personality surrounding the decision (Clayton, 2004). Hall and Brace (1999) summarize that the new institutionalism model “emphasizes that outside forces, especially congress and the public are always a consideration in

the votes of justices” (Hall and Brace, 1999). Clayton (2004) also reminds us that the term “institutions” does not limit the model to the other branches of government, but to all aspects of political activity that include interest group influence, the role of the solicitor general, and even public opinion. Although the attitudinal model is still considered the most dominant for predicting behavior, the new institutionalism model is closing the distance. This is reflected in the number of studies that examine the effect of institutional factors on judicial decision-making.

However, it is important to note that the new institutionalism is not incompatible with the attitudinal model. As some scholars have noted, strategic judges will not necessarily act insincerely, they could still vote consistent with their preferred preferences with constraints on those votes; institutions mediate between preferences and outcomes (Maltzman et al., 1999, 47). New institutionalism simply denies that the behavior of political actors can be explained solely with reference to instrumentalist rational self-interest (Davis, 2004, 318).

Outside influence on the court has not been limited to Congress only. One study of the Court’s voting decisions involving cabinet and other agencies revealed that justices are influenced by external extra-legal factors, most notably presidential approval (Yates, 1999, 349). This work reveals that justices are aware of the strength of other political actors and that the stance of the public matters in important policy areas. The interaction of the Court and interest groups has predominantly been studied in the nomination process (see: Caldeira and Wright, 1998, Moraski and Shipan, 1999, Collins, 2007, and Lindquist and Solberg, 2007), but scholarship has increased in this area as well. Some have found that the Court does adjust its decision outcomes to align with changes in public opinion (Erickson et al., 2002, McGuire and Stimson, 2004).

In addition to Martin's findings concerning the strength of congressional influence over the actions of justices, Bergara et al. (2003) find that the court adjusts its decisions to align with congressional preferences (Bergara et al., 2003). New institutionalism models also account for internal Court constraints; most notable is the work on membership change that accounts for shifts in the overall Court's behavior (Krehbiel, 2007, Baum 2007).

As noted previously, and of particular importance to this research, new institutionalism does not aim to replace the attitudinal model or the strategic model; it seeks to build upon them. As Maveety summarizes:

“If the justices' goal is to establish national policy that is as close as possible to their ideal points, they must take into account the preferences of other relevant actors (congress, the president (and others)), and the actions these others are likely to take. Justices who do not make such calculations risk congressional overrides and thus risk seeing their least preferred policy become law” (Maveety, 2004, 212).

The primary criticisms of new institutionalism are that justices may not be able to anticipate the actions of other actors accurately, and that like the attitudinal model, new institutionalism scholars rely on the final vote of justices as the dependent variable to quantitatively test for the impact of other actors. This eliminates much of the bargaining process observed by rational choice scholars. Another concern is that models that have tested for separation of powers effects on the court have found various and inconsistent evidence of an effect on judicial decision-making (Richardson and Scheb, 1993, Sala and Spriggs, 2004). A final critique of new institutionalism scholarship concerns lag time. If it is assumed that judges can in fact know the preferred policy of other actors (as Epstein and Knight, 1998 suggests), it is difficult to quantify and measure precisely the amount of time it takes for information

preferences to travel from other political actors such as the congress, the president and the electorate, to the Supreme Court justices.

Despite these concerns, the new institutionalism approach appears to be the future of judicial politics. This trend is observed in the majority of scholarship emerging in public law. This dissertation hopes to continue in the trend of research that embraces new institutionalism assumptions while also accepting relevant theory from each of the approaches discussed herein. The final aim of this work then becomes producing a model that encapsulates a comprehensive theory of judicial decision-making.

#### *Linking the Literature to My Dissertation*

Each of the approaches previously discussed emphasizes a set of variables that is (purportedly) most important in determining judicial behavior. The legal model, for example, identifies precedent as most important. The attitudinal model, in contrast, identifies judges' attitudes as most important, while the rational approach emphasizes strategic considerations. I am most convinced by the new institutionalism approach to explaining judicial behavior. This approach is most useful, I believe, because it considers a wider range of factors influencing judicial behavior. Because it is so important, I will say a few more words about it.

The roots of new institutionalism can be traced back to Dahl (1957), McCloskey (1960) and Walter Murphy (1964). Yet not until much more recently have judicial scholars applied the new institutionalism to judicial behavior in earnest. For example, Rogers Smith argued in 1988

for the reconciliation of behaviorist concerns with a review of the broader political environment that new institutionalism embraces. Hall and Brace (1999) went further, suggesting that the attitudinal model incorrectly treated the Supreme Court as completely autonomous, and suggested the adoption of new institutionalism notions which emphasized that other political actors are always a constraint on the votes of justices.

In order for the preferences of other political actors to be a factor in Supreme Court decision-making there must be some evidence that justices are aware of these preferences. While Baum (1997) demonstrated that there was a relationship between Court outcomes and legislative action, it was Epstein and Knight (1998) who determined that justices could be aware of these preferences with relative ease through briefs to the Court. They used a textual analysis of conference papers to conclude that justices often state their beliefs about the anticipated actions of other political actors in a majority of cases. This finding was further bolstered by Timothy Johnson (2003), who observed that justices consistently seek knowledge of executive preferences.

Additionally, new institutionalism literature has furthered the examination of the executive-judicial relationship. Scholars have found that presidents seek to move the Court's ideological median at the time of appointment (Krehbiel, 2007), that presidential ideology affects the direction of judicial voting behavior (Martin, 2006) and that the president's approval rating affects voting on executive agency action (Yates, 1999).

Yet new institutionalism theories also suggest that public preferences are relevant to the discussion of judicial behavior as well as presidential and legislative outlooks. As pointed out by

Casillas et al., (2011), public opinion has served as a major constrain on the court when accounting for issues of case salience or institutional change. Consistent with Stimson's view of political actors acting within the public's "zone of acquiescence," Casillas et al. (2011) demonstrate that the Supreme Court will strive to deliver rulings within the general public's zone of acquiescence for all cases needing to avoid opinions so dubious they led to questions of the Court's legitimacy. Casillas et al. (2011) ultimately suggest that the Court's behavior over time should change parallel with changes in public mood.

Next I will consider the concept of judicial "drift." In this research, I will define "drift" as the ideological distance that occurs over the justice entire tenure. The justice ideal point drift will be measured from their appointing president, their initial scores, and those of other political institutions. Though it was once thought that justices were stable in their preferences, empirical studies of judicial behavior suggest otherwise; "contrary to the received wisdom, virtually every justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times (Epstein et al., 2007, 1486). Building on this finding, this work will try to isolate the various phenomena that inspire justices to "drift."

"Drift" will be a major variable in the substantive chapters of this dissertation, as it is a concern for presidents who aim to enhance their legacy through judicial appointments and a prominent factor in any examination of judicial behavior. Epstein et al. (2007) found that of all the justices that served at least 10 terms since 1937, 12 of them drifted to the left over the course of their careers, seven drifted to the right, and three justices, Burger, Douglas, and Harlan, drift in opposite directions at different stages in their career. This finding, coupled with justices serving comparatively longer terms than justices of an early age, have led some scholars to

suggest that ideological appointments are a mistake, as “those believing they can entrench their views in the court for decades to come are occasionally mistaken” (Epstein et al., 2007, 1526).

In short, there is now considerable evidence that new institutionalism is a valid approach to the study of judicial behavior. That is the approach I adopt here. However, I design my empirical models to account for variables identified by other approaches as well. Ultimately, it is my hope that this dissertation will be able to better decipher the causes of judicial voting behavior consistent with new institutionalism doctrine, but not at the expense of what can be understood by factoring in the influences on the justices posited by the other approaches.

### *Conclusion*

Gibson no doubt was correct when he observed in 1983 that public law lacked a comprehensive theory (Gibson, 1983, 7). Despite the major advancements in the subfield, the acceptance of new theories, and increased use of the appropriate statistical techniques, review of the literature leads me to the same conclusion over 25 years later. Despite calls from some scholars to end such contentious debate, when it comes to defending one’s preferred approach or methodological model to examine judicial behavior (Maveety, 2004, Bonneau et al., 2007), there appears to be little movement in that direction, though works from Maltzman et al. (2000) and Clayton and Gillman (1999) are certainly signs of progress. This dissertation hopes to be another step in that direction. The purpose of this research is not to defend a particular approach, but rather to aid in our ability and to explain and predict judicial behavior.

Quoting J. Woodford Howard, Maveety (2004) describes the key disagreement among public law scholars by noting that “the core debate is not about whether attitudes matter but about how one infers those attitudes and what one can actually predict by knowing those attitudes. Quantifiers infer attitude from aggregate votes, qualifiers from reading opinions” (Maveety, 2004, 230). In this regard, the attitudinalists have won; there is no prevalent theory that does not account for justice ideology, and the attitudinal model is the dominant paradigm in judicial politics currently. However, a shift may be occurring.

In an updated edition of their seminal work *The Supreme Court and the Attitudinal Model*, Segal and Spaeth account more for rational choice aspects in their model (Hammond et al., 2005, 41). The popularity of the rational choice approach is growing as it takes the important aspect of the attitudinal model, but expands the scope of the study of judicial behavior to account for other constraints on justices. The future of the subfield appears to be in building on the new institutionalism models that examine other factors that influence vote choice for justices. Perhaps one day the public law subfield will emerge with a theory that answers Gibson’s call and combines the traditional approach, the behavioral approach and the rational choice approach to make a comprehensive model of judicial behavior that enhances both explanation and predictability of judicial decision-making.

One final note of clarification for this research, the new institutionalism approach has traditionally seen scholars view justice’s vote in light of the political factors that surround the vote. Through use of the Bailey ideal points this dissertation aspires to the same conclusions, yet I examine the causal relationship from the opposite side. I first consider the political context of the time when a justice is appointed, and in a given year (in separate models), then, using OLS

regression, this work will aim to determine the factors that lead justices to display the ideal points that they ultimately reveal through their voting choices. This difference in research approach is subtle, yet important to note.

Rogers Smith (1988) declared that new institutionalism was the future of public law. Given the statistical advancements in the field since that declaration, it appears he was correct. In examining where judicial preferences are created, it is observed that the assumptions of new institutionalism scholars are correct, and that the impact of other political actors not only shapes the actions of justices on the Supreme Court, but also what kinds of justices will serve at the Supreme Court in the first place. In this research, all of the theories mentioned in this review will be expanded upon with an original dependent variable applied to models of judicial decision-making.

Through this approach I will examine the major research question of this work: What factors affect Supreme Court justices' voting decisions? To explore this question completely this dissertation also aims to uncover other factors that influence judicial preferences. I do so by asking questions that include but are not limited to: does Supreme Court voting change over time? And if yes, what accounts for these changes? What factors account for Supreme Court justices' ideological movement away from their appointing president? How successful are presidents at selecting justices that reflect their policy preferences? What accounts for differences in presidential success in selecting justices that reflect those policy preferences? And finally, is the appointing president's ideal point the most important influence on Supreme Court justice voting behavior?

It is my belief that the answers to all of these questions, examined through models where precise ideal points serve as the dependent variable in a fashion unique to this research, will develop new theory into the public law subfield. I hope to answer the pleas of scholars like Gibson and Maveety by developing a more inclusive and precise model of judicial decision-making, one that is not concerned with satisfying or advancing one approach of the discipline at the expense of the others, but rather aims to increase the level of explanation and predictability of Supreme Court justice voting behavior.



# **I I I . J u d i c i a l B e h a v i o r**

In this chapter I explore the voting behavior of Supreme Court justices and the impact outside political influences have on justice's decisions. The research question at the center of this chapter is this: What factors affect Supreme Court justices' voting behavior? To address this question I use two precise measures of judicial behavior as my dependent variables: (1) *Yearly Supreme Court justice ideal point* (in the first two models); and (2) *Career Supreme Court justice ideal point* (in the third). Use of ideal points as a representation of justice ideology has gained currency among scholars of judicial decision-making, and I expect to utilize them to their full potential herein.

Another contribution of this chapter is that it considers a wide range of factors purported to affect Supreme Court decision-making. Among these are external factors such as the behavior of the president and Congress—factors highlighted in the theory of new institutionalism. Additionally, I will examine how the behavior of other Supreme Court justices affects the behavior of individual justices, thus considering the factors highlighted by strategic theories of judicial behavior. I also control for the impact of other political phenomena, such as public opinion. Further, I examine the impact of the other justices on individual voting behavior by making use of a new variable, *Justice-Independent Court median*. In short, I provide a new evaluation of the strategic or rational choice approach. Finally, I explore the relationship between the career voting scores of justices and the presidents who appoint them. I do this to see if there are high levels of ideological congruity between justices and their appointing president. Describing the state of the judicial politics subfield, Nancy Maveety (2004) reported that there was no comprehensive theory of judicial behavior. In this chapter, I aim to answer her challenge by developing a comprehensive model of Supreme Court decision-making.

### **A. A Model of Judicial Behavior**

Until recently, studies of Supreme Court voting behavior tended to be limited to only one of the major approaches discussed in Chapter 2. At one time, public law was hindered by a division between those still beholden to the legal model and those who believed improved methodological techniques offered increased explanation and prediction of judicial voting behavior. Quoting J. Woodford Howard, Maveety describes the central disagreement among public law scholars where “the core debate is not about whether attitudes matter but about how one infers those attitudes and what one can actually predict by knowing those attitudes. Quantifiers infer attitude from aggregate votes, qualifiers from reading opinions” (Maveety, 2004, 230). The attitudinalists have won; currently there is no prevalent theory that does not account for some degree of justice ideology. However, a shift in this paradigm is underway toward the theory of new institutionalism. In short, new institutionalism expands upon the findings of the rational choice literature and posits that Supreme Court justices are politically aware of, influenced by, and perhaps even directed by the preferences of other political actors. Supreme Court justices make choices and craft opinions of the Court with anticipated actions and preferences of other institutions in mind (Gillman, 1999, 30).

I aim to produce a model of voting behavior that accounts for relevant aspects of each of these approaches. In this section, I present a model of judicial behavior that explores all of the following: (1) the relationship between the voting behavior of justices and their pre-confirmation ideology, as called for by the attitudinal model; (2) the relationship between the voting behavior of justices and the other justices on the Court that the bargaining literature suggests is germane;

and (3) the relationship between the voting behavior of justices and the preferences of Congress and the president that are of the outmost import according to the theory of new institutionalism.

### *Literature Review*

The seminal work in support of the attitudinal model is Segal and Spaeth's *The Supreme Court and the Attitudinal Model* (1993). Hagle and Spaeth (1991) describe the main conclusion of the attitudinal model as follows: "the justices' votes depend on their attitudes and policy preferences" (Hagle and Spaeth, 1991, 119). According to the attitudinal model the most important variable in determining judicial vote choice is the fixed ideological preferences of the justices. The attitudinal approach discounts the importance of external and internal constraints on justices, and posits that votes are determined by ideology (Maveety, 2004, 53). According to the attitudinal model, because of a number of institutionalized factors, most notably their lifetime appointments, justices can sincerely pursue their preferred policy goals and need not behave strategically when voting on the merits of a case (Rogers, et al., 2006, 5). The crux of the theory is that justices' decisions are based on facts of the case (as the legal model posits), but only in light of the ideological predispositions of the justices (Segal and Spaeth, 2002).

The rational choice model, sometimes called the strategic model, dates to the work of J. Woodford Howard (Maveety, 2004, 228). Howard observed that justices sometimes change their votes during the process of decision-making. This would not happen if the attitudinal model were correct. As Maveety (2004, 233) writes: "Because votes and opinions frequently change in response to intra-court influences, votes and opinions are not necessarily reliable indicators of attitude, ideology, or jurisprudential philosophy." Rational choice scholars assume that judges

have many goals, and that any of these goals can be relevant in shaping their behavior, yet to best achieve these goals, justices participate in bargaining (see: Gibson, 1983 and Baum, 1994). As Walker notes, “Individual justices cannot achieve their institutional or policy goals by acting alone. Instead, a justice depends on the preferences and actions of other members of the court” (Walker, 2004, 252).

Empirically, this notion has been confirmed by a number of scholars who find that initial votes at conference and the final outcome of Supreme Court cases often are not aligned (Maltzman et. al, 2000, Carp et. al, 2007). The strategic model posits that justices bargain with other justices to determine what action will best help them achieve a broader objective. This suggests that a justice may at times vote counter to his/her true ideological preferences in order to achieve those objectives (Wrightsmen, 2006). While there is ample empirical evidence to suggest that the sort of bargaining that Epstein and Knight (2004) describe is indeed present, the rational choice approach fails to account for external constraints on justices that may have the same type of impact on voting outcomes as intra-Court influences do.

The new institutionalism builds on the rational choice perspective by incorporating the presence of interaction between justices and other political actors. Epstein and Knight (2004) quote Walter Murphy as having written that justices will be willing to moderate their views to avoid extreme reactions from Congress. As noted by Andrew Martin, the powers that Congress can levy against judicial activity that it opposes are impressive. These powers include the powers to impeach and remove justices, increase the number of justices on the Court, change federal jurisdiction, and propose constitutional amendments (Martin, 2006, 3).

It is important to note that the new institutionalism is not totally incompatible with the attitudinal model. Strategic judges will not necessarily act insincerely. They may still vote consistent with their preferred preferences despite constraints on those votes as institutions mediate between preferences and outcomes (Maltzman et al., 1999, 47). New institutionalism simply denies that the behavior of political actors can be explained solely with reference to instrumentalist rational self-interest (Davis, 2004, 318).

There is considerable difference in each of these approaches to the study of judicial voting behavior, yet each shares the goal of aiming to better understand and predict Supreme Court behavior. In 1988, Rogers Smith declared that new institutionalism was the future of public law. Given the statistical advancements in the field since that declaration it appears to be a reality. This work aims to further the development of new institutionalism theories. Accordingly, I develop a model of judicial preferences that accounts for aspects of each of the approaches. By accounting for each of the approaches, I produce a model that offers a more comprehensive explanation of judicial voting behavior.

### *Data and Hypothesis*

I will conduct my analysis using Michael Bailey's ideal points. My data are described in detail in Chapter 1 of this dissertation. As a reminder, Bailey's measure is preferred to others as each justice is scored on the same numerical plane measured across time and institutions (Bailey, 2007). To account for variation across institutions, Bailey established a data set of presidents and members of Congress stating an ideological preference on issues pertaining to Supreme Court cases. Note that the justices in the Bailey data appointed by FDR are removed in this analysis as

Bailey does not provide an ideal point for Roosevelt. To account for variations across time, Bailey makes use of “cut point” locations and employs Bayesian Markov Chain Monte Carlo methods. For a full explanation of the techniques used by Bailey in creating his ideal point scores, see: Bailey (2007). (The scores for all actors and institutions were updated in 2009 in *The Constrained Court* by Michael A. Bailey and Forrest Maltzman).

### *The Dependent Variable*

The dependent variable here is *Yearly Supreme Court justice ideal point*. This is a yearly score that Bailey applies to each justice for each year from 1950-2008. I use a panel dataset that examines shifts in the ideological scores of individual justices. Specifically, in Model 3.1, I use data that offers ideal points for Supreme Court justices based on their score in the Michael Bailey ideal point dataset. Model 3.1 covers the 1949 through 2007 Court terms and analyzes 27 Supreme Court justices. Each justice’s ideal point score is a yearly numeric representation of his/her ideological position, where increasing negative numbers represent increased liberalism and larger positive numbers indicate more conservative preferences. *Yearly Supreme Court Justice ideal point* has a mean value of -.092 and a range of -2.10 -1.28.

### *Independent Variables*

In Model 3.1, I use five independent variables. I included one variable to represent the attitudinal model, one for the bargaining approach, and the last three to reflect the new institutionalism. The first independent variable in Model 3.1 is *Segal/Cover ideology score*. This variable is included to control for each justice’s pre-confirmation ideology—that is, the preference he/she displayed

before ascending to the Supreme Court. Segal and Cover (1989) conduct an analysis of pre-confirmation editorial pieces in major newspapers to place justices on the ideological scale where 0 (Scalia) is most conservative and 1 (Brennan, Fortas, Jackson, and Marshall) most liberal. This indicator of ideology before a justice serves is necessary to distinguish pre-confirmation preferences from post-confirmation shifts in judicial voting behavior. This measure is also used in Model 3.2 of this work, and although derived through similar techniques should not be confused with the *Segal/Cover qualification score* from Chapter 4. This variable has a mean value of 0.506. Because *Yearly Supreme Court justice ideal point* increases in value with increased conservatism, and *Segal/Cover ideology score* becomes larger with increased liberalism, Hypothesis 1 states that there will be a negative relationship between *Yearly Supreme Court justice ideal point* and a justice's *Segal/Cover ideology score*.

Next I will control for the preferences of the other justices on the Court through use of the *Supreme Court median*. The judicial bargaining approach to the study of judicial politics expects that the actions of the other justices on the Court impacts the behavior of justices, I include *Supreme Court median* to control for such an impact. In short, this variable accounts for the notion of intra-court bargaining that the rational choice theory posits greatly impacts Supreme Court voting behavior. This variable is the yearly ideal point reported by Bailey for the Court as an institution from 1950-2008. Making use of the Bailey measure provides an ideological representation for the Court that is in the same scale as the other actors in this model, thus offering valid comparisons across time and institutions. For a full explanation of the techniques used by Bailey in creating his ideal point scores, see: Bailey (2007). This notion is tested in greater detail in Model 3.2 of this chapter. The mean *Supreme Court median* is .036

with a range from -1.365 (1968) - 0.478 (1993). Because the rational choice literature finds that justices are impacted by the preferences of their fellow justices (Epstein and Knight, 2004) Hypothesis 2 suggests that there will be a positive relationship between *Yearly Supreme Court justice ideal point* and the *yearly Supreme Court median*.

The next three independent variables each pertain to the relationship between Supreme Court justice ideology and the preferences of other institutions of government. They are included in Model 3.1 to account for the new institutionalism approach to judicial behavior. The first of these variables is *Yearly president ideal point*. I account for the impact of presidential ideology by including Bailey's *Yearly president ideal point* score. Bailey develops the yearly score for presidents in accordance with positions presidents offered relative to Supreme Court cases (Bailey, 2007, 441). *Yearly president ideal point* reports the sitting president's preferences for each year from 1950-2008, with Johnson's score used in 1963 and Ford's in 1974. Because negative numbers are associated with a liberal ideology and positive numbers are associated with a conservative ideology, Hypothesis 3 predicts that there will be a positive relationship between *Yearly Supreme Court justice ideal point* and the *Yearly president ideal point* scores. The range of this variable is -1.37 (Kennedy) to 1.15 (Reagan) with a mean value of .057.

Model 3.1 also includes *Appointing president's ideal point*. I make use of this Bailey ideal point score to capture the ideology of the appointing president for each individual justice. These scores are derived from Bailey's assessment of presidential positions on Supreme Court cases (Bailey, 2007). I anticipate based on the presidential literature that there is a strong relationship between the ideology of appointing presidents and the justices they appoint to the Court (Segal et al., 2000, Epstein et al., 2007). This expectation leads to Hypothesis 4—as the

*Appointing president's ideal point* increases in value, so will *Yearly Supreme Court justice ideal point*. The Bailey scores for presidents in this sample range from -1.37 (Kennedy) to 1.15 (Reagan), with a mean of .057. The value of *Appointing president's ideal point* remains constant throughout a justice's tenure. The Bailey scores for all presidents are listed in Tables 3.4 and 4.5.

Finally, Model 3.1 accounts for the ideological preferences of Congress by accounting for the yearly *Congress median* as reported by Bailey. *Congress median* serves as an institutional control variable that represents the yearly median ideal point of the legislature. Epstein and Knight (2004) quote Walter Murphy as writing that justices are willing to moderate their views to avoid extreme reactions from Congress (Epstein and Knight, 2004). Here, I control for this potential influence on judicial voting behavior. Previously, new institutionalism scholars have found that there is a relationship between Supreme Court voting behavior and the preferences of Congress (Binder, 1999, Baum, 2007, Abraham, 2008); consistent with these findings Hypothesis 5 posits that there will be a positive relationship between *Yearly Supreme Court justice ideal point* and *Congress median*. This variable has a range of -0.3315- 0.8185, and an average of 0.032.

### *Model*

Ultimately, these variables yield the following GLS random effects time series regression equation:

Model 3.1:

$$Y (\textit{Yearly Supreme Court justice ideal point}) = x_1(\textit{Segal/Cover ideology score}) + x_2 (\textit{Supreme Court median}) + x_3 (\textit{Yearly president ideal point}) + x_4 (\textit{Appointing president's ideal point}) + x_5 (\textit{Congress median}) + u$$

*Results*

Table 3.1 reveals the results of this model. First, I observe a strong negative significant relationship between *Yearly Supreme Court justice ideal point* and *Segal/Cover ideology score*. This finding supports Hypothesis 1 and thus the major tenants of the attitudinal model. The findings in Model 3.1 provide strong evidence that the ideological attitudes a justice possesses before he/she begins serving on the Court remain a relevant factor in determining his/her future voting choices.

Yet Table 3.1 also reveals that there is more to the story. I find that there is no statistically significant relationship between the yearly measures of the Court median and the dependent variable, and thus I must reject Hypothesis 2. Model 3.1 shows no connection between the preferences of the other justices on the Court and individual voting behavior. Thus, Model 3.1 is not as robust for the rational choice approach as the others mentioned previously in this work. The findings of Model 3.1 that pertain to *Supreme Court median* are tested further and with a more appropriate variation of the measure of intra-court bargaining in the following section.

**Table 3.1: Yearly Supreme Court Justice Ideal Point Voting Score, 1950-2008**  
**(GLS, Random-Effects Time Series Regression)**

Independent Variables	<u>Model 3.1</u> Dependent Variable = <i>Yearly Supreme Court justice ideal point</i>
<i>Segal/Cover ideology score</i>	-2.105*** (.485)
<i>Supreme Court median</i>	.0495 (.033)
<i>Yearly president ideal point</i>	-.0206* (.012)
<i>Appointing president's ideal point</i>	-.1056 (.143)
<i>Congress median</i>	.1162* (.062)
Constant	.9278 (.252)
Justices	27
Total justice terms	449
Rho	.88
Variance inflation factor	1.25
Wald chi-squared	34.43***
Breusch-Pagan LaGrange multiplier, random effects	3613.50***

Note: Standard errors for independent variables in parentheses; two-tailed test; \*p<.10; \*\*p<.05, \*\*\*p<.01

In terms of the new institutionalism, Table 3.1 offers strong evidence that there is a connection between yearly voting preferences of justices and the preferences of Congress and the sitting president. Model 3.1 finds that there is a significant relationship between the yearly ideology of the president and the ideal point of Supreme Court justices. However, I must reject Hypothesis 3 because the relationship in Model 3.1 is a negative one, which is contrary to my expectations. In short, Table 3.1 displays findings that suggest that the *Yearly Supreme Court justice ideal point* becomes more conservative as the *Yearly president ideal point* becomes more liberal. This finding contradicts those of other scholars, most notably Andrew Martin (2006). I also note in Model 3.1 that the ideal point of the appointing president has no relationship to *Yearly Supreme Court justice ideal point*. Thus I reject Hypothesis 4 as well.

As it concerns the relationship between Congress and the Court, however, Table 3.1 reports that there is positive relationship between the *Yearly Supreme Court justice ideal point* and the yearly *Congress median*. In short, I find that as the Congress becomes more conservative, so too will the preferences of the Supreme Court justices. Thus, Hypothesis 5 is not falsified. This finding is consistent with other research concerned with this relationship, and provides support for the theory of new institutionalism.

### *Conclusions*

In an attempt to account for multiple determinants of Supreme Court voting behavior, I have developed a model that accounts for the tenants of the attitudinal model, the strategic approach, and the new institutionalism. By making use of the Bailey ideal points, I have done so using measures that offer scores on the same scale making comparisons and conclusions about

relationships more methodologically sound. While Model 3.1 likely falls short of serving as *the* model of Supreme Court voting behavior that Maveety (2004) desired, and as I initially set out to develop, it is a step towards that end. The findings herein further the prevailing notion of the attitudinal model that “attitudes matter.” The evidence offered in Table 3.1 clearly demonstrates a strong relationship between judicial preferences once on the Court and ideological positions prior to confirmation. Yet consistent with other studies that account for the theory of new institutionalism, I find that there is a link between the ideological leanings of the other institutions of government and the preferences of Supreme Court justices.

I find that a strong positive relationship between the ideological median of Congress in a given year and the ideology score of justices during the same term. In short, as the Congress becomes more conservative, so too will Supreme Court justices. This finding provides robustness to previous studies that have suggested that there is a strong link between the two. However, I must concede that further study of this relationship is necessary. Still to be determined is whether Supreme Court justices are following the ideological lead from Congress, or whether both institutions are simply reflecting the ebbs and flows of the nation’s drifting policy mood at any given time. A correlation analysis between the public policy mood as reported by James Stimson (1999, updated online 2011) suggests that this second explanation remains a possibility. Future research into the ideological relationship between justices and Congress need to be cognizant of the potential impact of public mood on both institutions.

The findings of a negative relationship between the sitting president and yearly justice behavior are contradictory to my expectations and previous literature (Martin, 2006). It was my expectation that just as with Congress, the justices in this study would behave ideologically in a

manner that paralleled the preferences of the current president. This was not the case in Model 3.1, which led to the rejection of Hypothesis 3. I will attempt to reconcile these findings with further exploration of the president's impact on Supreme Court voting behavior in Model 3.3. Perhaps it is the case that individual presidents are too unique and isolated in their positions to have an impact on life-tenured actors whom they have not appointed. A president-specific analysis will further clarify the picture.

I also find no relationship between the *Yearly Supreme Court justice ideal point* of justices and the ideal point score for their appointing president. Further study of this relationship will center on the ideological distance between justices and their appointing presidents. That possibility is tested in great depth in Chapter 4 of this dissertation.

Finally, I note no significant findings for the rational choice approach, as there was no observed relationship between justices and the yearly *Supreme Court median* as reported by Bailey. Thus, I rejected Hypothesis 2. Yet this is not the end of the line for this research. In the following section of this chapter, I will again attempt to account for the type of intra-Court bargaining that Epstein and Knight (2004) and Hammond et al. (2006) describe as essential in the Supreme Court decision-making process. However, in Model 3.2 I make the methodological adjustments to previous studies that allow for the ideological relationship between Supreme Court justices and the other justices serving on the Court at the same time to be captured.

## **B. Reconsidering the Supreme Court Median**

After my initial exploration I now begin the process of refining my model by examining a particular specific influence on a justice's voting behavior—the collective preferences of his/her colleagues on the Court. While this dissertation takes great care to consolidate the attitudinal and new institutionalism approaches to judicial politics, this section will explore the application of rational choice theories to the Supreme Court. Theoretically, scholars such as Baum and Maltzman, et al. (2000) have suggested that justices do not act simply as isolated, autonomous actors, but that there are periods of negotiating between justices, and that the justices are anticipative of, and reactionary to, the choices their colleagues make.

Here, I address a common variable used in the rational choice literature—the Supreme Court median. Since Howard (1968) first commented on the idea that judges changed their stances as case discussion took place at conference—the process he called “fluidity”—scholars have been curious about the effects of the preferences of other justices on individual justice voting behavior. Previously this relationship has been measured by examining each justice's ideological distance from the preferences of the Court's median justice or the median of the Court as an institution. As measurement techniques improved in political science this representation has largely remained unchanged. To date, the Supreme Court median variable remains a standard independent variable in models that examine judicial voting behavior from the rational choice approach.

Yet use of this flawed variable has created a need to re-examine previous conclusions about judicial bargaining with a more accurate representation of the preferences of other justices on the Court. Here, I attempt to provide an initial study of this relationship using the improved

measure *Justice- Independent Court median*. This variable will address intra-Court influences by measuring an individual justice's voting score in any given Court term against the median voting score of the *other* justices serving at the same time. Model 3.1 places the Bailey data in the relevant literature by making use of traditional measures of potential influences of Supreme Court voting behavior in a model of judicial decision-making. In Model 3.2, I advance this line of research by developing and testing more specific measures of certain influences on Supreme Court voting behavior. Specifically, the *Justice-independent Court median* and *Filibuster pivot ideology score* offer more exact measures of the political phenomena such as the Court's median or Congress median made use of in previous works, including the previous model in this chapter. Ultimately, this research offers an improved examination of the yearly impact that the collective preferences of the other justices may have on an individual justice's voting behavior.

### *Literature Review*

Generally, rational choice theory is based on the assumptions that individuals are self-interested actors who can choose the best alternative for their interests, and that their choices are made in line with their expectations regarding the actions of others (Ostrom and Ostrom, 1971, 205).

Perhaps the first major application of rational choice theory to judicial behavior was presented by Walter Murphy in 1964. Murphy highlighted the fact that a variety of influences played a role in a justice's arrival at a final vote, specifically describing how justice's relied on "expectations about the choices of other actors" (Epstein and Knight, 2003, 200). A second early work was Howard's (1968) piece which described the "fluidity" of Judicial Choice. The concept of fluidity

notes that justices change their votes at various points during the decision-making process (Howard, 1968). In sum, these early applications of rational choice principles to Supreme Court justice's shifting preferences indicated that judicial voting behavior was impacted by influences beyond ideological preferences.

Two modern works regarding strategic intra-Court behavior are Epstein and Knight's *The Choices Justices Make* (1998), and Maltzman, Spriggs and Wahlbeck's *Crafting Law on the Supreme Court: The Collegial Game* (2000). Epstein and Knight (1998) develop their theory based on the private papers of Justices Brennan, Marshall, and Powell. They illustrate that a change in justice preferences are seen in three distinct categories: First Draft, Reaction to First Draft, and Published Opinion. Their findings bolster Howard's (1968) claim that justices alter their preferences during various points in the decision-making process.

Maltzman et al. (2000) describe evidence that the Chief Justice will assign opinion writing duties to a justice who is ideologically distant from the majority as the size of the initial majority coalition gets smaller (Maltzman et al., 2000, 36). The explanation offered is that this is an attempt by the chief to convince a resistant justice to join the majority. Johnson et al. (2005) also report that at times during the conference vote, justices will pass when it is their turn to vote in order to gather information about how others plan on voting. Collectively, all of these studies suggest that a Supreme Court justice is willing to adjust his/her own policy preferences to influence the opinion writing process.

Similarly, Landes and Posner (2009) find that Democratic appointees vote increasingly liberal when they are fewer in number, while conversely, Republican appointees become more conservative as their numbers increase (Landes and Posner, 2009). This finding provides an

interesting subtext to the political debate surrounding judicial appointments broadly, and it has serious ramifications for studies seeking to explain judicial voting behavior. However, the appointing president's party membership serves as the indicator of a justice's ideology in their study. This representation of preferences is overgeneralized and not specific enough to track subtle changes in preferences that have a major impact on the Court's policy outputs. By making use of the Bailey ideal points, I modify the approach of Landes and Posner (2009) to address intra-Court influences on voting behavior. By measuring an individual justice's yearly voting score against the median voting score of the other justices serving at the same time, I will capture an important aspect of the rational choice approach to the study of judicial behavior.

#### *Data and Hypothesis*

I will conduct this analysis using Michael Bailey's ideal points. These data are described in detail in Chapter 1. As a reminder, Bailey's measure is preferred to others as each justice is scored on the same numerical plane measured across time and institutions (Bailey, 2007). To account for variation across institutions Bailey established a data set of presidents and members of Congress stating an ideological preference on issues pertaining to Supreme Court cases. To account for variations across time Bailey makes use of "cut point" locations and employs Bayesian Markov Chain Monte Carlo methods. For a full explanation of these techniques, see Bailey (2007). (The scores for all actors and institutions were updated in 2009 in *The Constrained Court* by Michael A. Bailey and Forrest Maltzman).

### *The Dependent Variable*

The dependent variable in this study is the *Yearly Supreme Court Justice ideal point*. This is the yearly score that Bailey has applied to the ideological activity for each justice from 1950-2008. This work makes use of a panel dataset that examines shifts in the ideological scores of individual justices. Specifically, in Model 3.2, I use data that offers ideal points for Supreme Court justices based on their score in the Michael Bailey ideal point dataset. Model 3.2 covers the 1950 through 2008 Court terms and analyzes 27 Supreme Court justices. Each justice's ideal point score is a yearly numeric representation of their ideological position where increasing negative numbers represent increased liberalism and larger positive numbers indicate more conservative preferences. *Yearly Supreme Court Justice ideal point* has a mean value of -.092 and a range of -2.10- 1.28.

### *Independent Variables*

The key independent variable here is *Justice-Independent Court median*. This yearly value is paired with each justice for each term and represents the median voting score for the other eight justices serving on the Court at the same time. I developed this variable along with Dr. Hemant Sharma for use in a study that compared the effect of the Court median on justice behavior using both Bailey ideal points and the *Judicial common space scores*. What differentiates this work from our earlier study is that I make use exclusively of the same Bailey data used in identifying the dependent variable in this study, and examine the justices over a longer period of time. This allows for greater comparison across all the models in this dissertation. Thus, in Model 3.2, the *Justice-independent Court median* is the median of the Bailey *Yearly justice ideal point score* for

the other justices serving during that term. In years where a justice is replaced during the term, the ideal point of the justice who cast the most votes that term is used in the calculation of the *Justice-independent Court median* for all justices (see: Sharma and Glennon, 2010).

The methodological necessity for this variable is apparent in the fact that previous studies that make use of the “overall” Court median, sometimes called “Supreme Court median,” fail to account for the fact that an individual justice’s behavior is a component of defining the overall Court median. These measures address the relationship between a collective and an individual without recognizing that the individual’s behavior had already impacted the collective score. To correct this error, I use a Court median that is independent of the justice whose yearly voting score is adjacently listed as a dependent variable in the panel dataset. The yearly median of the ideal points of the other justices serving on the Court is presented through the key independent variable *Justice-Independent Court median*.

Considering the contributions of the new institutionalism and rational choice approach theories to the study of public law, Hypothesis 1 posits that there will be a positive relationship between *Justice-independent Court median* and *Justice ideal point*.

In other words, I expect that as the median conservative voting score of the other justices serving on the Court at the same time increases, an individual Supreme Court justice’s voting score will also increase. In short, the justices in my study will become more conservative as the other justices serving with them do the same.

Model 3.2 also includes a number of control variables related to the attitudinal model and the theory of new institutionalism. First, I account for the impact of presidential ideology by including Bailey’s *President ideal point* score. Bailey develops the yearly score for presidents in

accordance with positions presidents offered relative to Supreme Court cases (Bailey, 2007, 441). *President ideal point* score reports the sitting president's preferences for each year from 1950-2008, with Johnson's score used in 1963 and Ford's in 1974. Negative numbers are associated with a liberal ideology and positive numbers are associated with a conservative ideology. Bailey *President Ideal Point* scores range from -1.37 (Kennedy) to 1.15 (Reagan) with a mean value of .057.

Next I include a measure of congressional ideology in order to control for the possibility that justices will consider potential legislative overrides when casting their votes. Consistent with the most important independent variable, one that offers an improved measure of an institutional (Supreme Court) median, Model 3.2 requires an improved calculation of the median preferences from the legislative branch as well. Accordingly, I make use of the *Filibuster pivot ideology score* as the relevant measure of congressional ideology. While previous studies have made use of a yearly Congressional median, this becomes the preferred representation of the congressional effect on justices as “without the consent of this legislator, passage of a bill that overrides a judicial decree—a major theoretical concern when accounting for congressional preferences and their impact of judicial behavior—would be impossible” (Sharma and Glennon, 2010, 13). While other new institutionalism research has begun to consider the importance of the filibuster pivot (Krehbiel, 2007 and Owens, 2010) this work is one of the first to make use of this more appropriate measure of potential separation of powers struggles between Congress and the Court.

This yearly score was created by Dr. Hemant Sharma, who generously made this variable available for this project. *Filibuster pivot ideology score* variable is created by first ranking the *Bailey ideal point* scores of all Senators serving during each specific session of Congress. After

the scores are ranked in ascending order, the potential cloture vote for ending a filibuster is located. In cases prior to 1975, this filibuster pivot is at the 67<sup>th</sup> (or 33<sup>rd</sup>) percentile, because before 1975, a 2/3 standard was needed to invoke cloture. In cases after 1975, when the standard was changed by an act of Congress, the 60<sup>th</sup> (or 40<sup>th</sup>) percentile is located. Within this study, the ideology score for the filibuster pivot is matched with the voting scores of justices from the Court term that officially began in October of the previous year consistent with the way Court term and yearly scores of other actors are treated throughout this work.

Finally, to account for concerns of the attitudinal model of judicial ideology, and to control for each justice's pre-confirmation ideology before he or she ascends to the Supreme Court, I make use of each individual justice's *Segal/Cover ideology score*. Segal and Cover (1989) conduct an analysis of pre-confirmation editorial pieces in major newspapers, to place justices on the ideological scale where 0 (Scalia) is more conservative and 1 (Brennan, Fortas, Jackson, and Marshall) most liberal. This indicator of ideology before a justice ever serves is necessary in order for scholars to distinguish post-confirmation shifts in judicial voting behavior. Though derived through similar techniques, *Segal/Cover ideology score* should not be confused with *Segal/Cover qualification score* made use of throughout Chapter 4. This variable has a mean value of 0.506.

### *Model*

Ultimately, these variables yield the following GLS random effects time series regression equation:

#### Model 3.2:

$$Y \text{ (Yearly Supreme Court justice ideal point)} = x1 \text{ (Justice-independent Court median)} + x2 \\ \text{(President ideology score)} + x3 \text{ (Filibuster pivot ideology score)} + \\ x4 \text{ (Segal/Cover ideology score)} + u$$

### *Results*

Table 3.2 demonstrates that as *Justice-independent Court median* increases (that is, as the Court becomes more conservative), individual justices respond by behaving more liberally. As a result of this finding, I must reject the hypothesis that justices become more conservative as their peers do. In fact, these findings suggest that the opposite is true. Theoretically this analysis demonstrates the presence of what Landes and Posner (2009) call “group polarization.” This notion suggests that justices will align themselves with greater zest or urgency in their respective ideologies if the perception that they are outnumbered on the Court is present. Thus, Hypothesis 1 is rejected in Model 3.2. Yet, the results offer strong support for the rational choice approach by revealing a link between the preferences of other justices’ serving on the Court collectively and an individual justice’s ideal point score.

**Table 3.2: Justice-Independent Court Median Impact on Yearly Supreme Court Justice Ideal Point Voting Score, 1950-2008  
(GLS, Random-Effects Time Series Regression)**

Independent Variables	Dependent Variable = <i>Yearly Supreme Court justice ideal point</i>
<i>Justice-independent Court median</i>	-.0698** (.036)
<i>President ideology score</i>	-.0042 (.013)
<i>Filibuster pivot ideology score</i>	.0619* (.034)
<i>Segal/Cover ideology score</i>	-1.877*** (.398)
<i>Constant</i>	.8036*** (.240)
Number of Justices	31
Observations (Justice Terms)	482
Wald Chi-Squared	29.56***
Rho	.89

Two-tailed significance levels: \*p < .10, \*\* p < .05, \*\*\*p < .01; standard errors in parentheses

Table 3.2 also displays that *Segal/Cover ideology score* is related to the dependent variable. Specifically, the findings offer support for the attitudinal model’s conclusions about the relationship between attitudes and judicial voting behavior. In sum, Model 3.2 continues to offer support for the attitudinal model, reporting a statistically significant relationship between the justice yearly ideal point score and their pre-confirmation ideology score. Yet, this result should

in no way detract from our central finding that the influence of attitudes on voting behavior can be affected by other factors.

Additionally, in Table 3.2 I determine that there is no relationship between the yearly presidential ideology and the justice's voting behavior, an interesting finding that is further developed in the next chapter of this work. I also find that there is a relationship between the *Filibuster pivot ideology score* and *Yearly Supreme Court justice ideal point*. This suggests that congressional attitudes are correlated with those of Supreme Court justices. Whether this is a reflection of the general policy mood or an indication that justices follow congressional cues remains open to further debate. For new institutionalism scholars, these inconsistent findings require careful explanation. Contrary to the findings of Martin (2006), yet consistent with the results presented previously in Model 3.1, the office of the presidency appears to have little impact on judicial decision-making when all cases are considered. Yet Model 3.2 does join other research that has observed that there is a relationship between the Senate and the Court.

In sum, Table 3.2 offers strong support for rational choice principles, as there is a strong relationship between voting behavior and *Justice-independent Court median*. This research also bolsters the attitudinal model, as the relationship between *Yearly Supreme Court justice ideal point* and *Segal/Cover ideology score* is significant at the .01 level. Also, I find that there is minimal support for the new institutionalism approach in the relationship between the Senate filibuster pivot and Supreme Court voting behavior.

## *Conclusions*

Overall, this research offers strong results regarding the relationship between a justice's voting behavior and the median ideology score for the other justices serving on the Court at the time a decision is made. Justice ideal point data reveals a significant negative relationship between a justice's voting score and the voting scores for all other justices serving on the Court during the same term. These findings held when the Martin-Quinn ideal points and the *Judicial common space scores* (and their associated independent variables) were tested in place of the Bailey ideal points in Model 3.2. These findings support the notion that justices are affected by those serving with them, but are not necessarily inclined to conform to the preferences of others.

In summary, these findings add to the public law literature that explores how changes in the Court's membership (which alters the median and justice independent median) and justice's reactions to the preferences of their colleagues can have dramatic effects on the Court's outputs. This research also again provides evidence that justices' pre-confirmation attitudes, as measured by Segal/Cover scores, are extremely relevant for explaining their voting behavior. Additionally I observe that institutional influences can also constrain justices. This is observed by the significance of *Filibuster pivot ideology score*, which suggests that congressional ideology is correlated with judicial voting behavior. This suggests that justices may act strategically in anticipating potential congressional reactions to their decisions.

In furthering this line of research it appears it would be wise to acknowledge the possibility that justices might only engage in strategic behavior in certain issue areas. Preliminary findings when the focus is narrowed to case issue-specific analysis (when Supreme Court justice voting behavior is considered based on the outcomes of cases in specific issue areas

as derived from the *Supreme Court Database*) finds evidence that justices do in fact mirror the tendencies of their colleagues in economic cases and in government power cases, but do not do so in civil liberties and civil rights cases (Sharma and Glennon, 2010). These findings will require further testing in future examinations of rational choice bargaining as applied to United States Supreme Court justices. Future research may also wish to assess the rational choice approach in “close votes” where it seems beneficial for justices to behave strategically. Such an analysis would be limited to 5-4 and 6-3 decisions. Ultimately, future scholarship should strive for the development of judicial behavior models that account for each of the approaches presented in this model.

### **C. Judicial Congruity with Presidential Preferences**

The appointment of a Supreme Court justice is viewed by many as an opportunity for a president to foster long term policy shifts compatible with his ideology. While some presidents have been disappointed in the ideological behavior of their appointments, not all justices abandon their appointers. In fact, many behave ideologically just as their appointer had envisioned. This leads to a fundamental question about whether justices behave in line with their appointing president's expectations about their voting preferences, and whether presidents are successful in seeing their preferred ideology represented on the Court by the justices they appoint.

The findings of the previous sections of this chapter have revealed much about the potential influences on the yearly voting behavior of Supreme Court justices. I have discovered that there are links between changes in Congressional and executive preferences and, when accounted for correctly, between the preferences of the other justices serving simultaneously and the voting preferences of Supreme Court justices. Yet the strongest case is made in Model 3.1 for proponents of the attitudinal approach, as the *Segal/Cover ideology score* is strongly linked with yearly voting behavior of justices on the Court. Building on these findings, I focus specifically on the relationship between United States presidents and the career voting output of the justices they appoint to the Court. Table 3.1 shows no significant relationship between the ideal point of appointing presidents and yearly justice ideal points, yet Model 3.1 does not tell us the full story. Herein, I consider the justice career voting score, one that presidents who view appointment to the bench as a chance for long term policy influence no doubt would be more concerned with as opposed to the yearly preferences of the justices they nominate.

In this section, I assess the relationship between Supreme Court justice career ideological voting and the ideology of their individual appointing president. Differentiating this work from previous research on the subject (Segal et al., 2000, Epstein and Segal 2005, Epstein et al., 2007), I make use of the Michael Bailey ideal points. This allows for comparison of preferences that are in the same numeric plane and that are valid across institutions and time. For a full discussion of the Bailey ideal points, refer to Chapter 1. The findings ultimately illustrate that over the course of their career justices are significantly aligned with the ideology of their appointing president.

Here, I aim to explore this relationship by using career voting data to examine the concept of judicial congruity. This model (Model 3.3) is created consistent with the approach Segal et al. (2000) used to determine that justices were ideologically aligned with their appointers. They did so by using the survey results of presidential scholars as the measure of presidential preferences (see: Segal et al., 2000). The major contribution of this work is in applying their structure to the Bailey ideal point scores which offer methodologically valid comparisons. It is my expectation that this research will reveal a very strong and positive relationship between the ideology scores of Supreme Court justices and the ideology score of their appointing president.

### *Literature Review*

Many scholars have shown that presidents have been successful in seeing like-minded individuals confirmed to the Court (see: for example, Dahl, 1957, Rohde and Spaeth, 1976, Heck

and Shull, 1982). However, the most important work on presidential and judicial concordance comes from Segal et al. (2000). Their findings offer strong support for the notion that presidential preferences are strong predictors of a justice's career voting score. I aim to update this research by studying this relationship utilizing ideal points that place the preferences of presidents and justices in the same scale. Additionally, I include control variables to account for institutional constraints on a president's ability to nominate their preferred choice to the Court. In short, it is my goal to mirror the structure of Segal et al. (2000), but offer findings that are methodologically stronger and in line with the theory of new institutionalism. Additionally, I extend the scope of this line of inquiry by appraising levels of congruity between justices and their appointing presidents throughout the course of their career.

Epstein et al. (2007) offer a comprehensive assessment of shifts in justice voting behavior over time, but they focus on justices who have served more than ten terms. They found that while justices will drift over time, there is a strong connection to the voting behavior of Supreme Court justices and the preferences of the president who appointed them, at least in the justices' early terms on the court. This work will account for all the justices covered in the Bailey data set as described previously, not only those with more than 10 terms served. This broader study of the phenomena allows for more complete generalizations to be made about the rate of judicial concordance with presidential preferences regardless of the length of service at the Supreme Court.

New institutionalism investigates how courts, and individual judges, interact with the other branches of government. For a broader review of new institutionalism generally, see: Chapter 2 of this dissertation. Because this work examines shifts in justice behavior relative to

the ideology of the appointing president it fits nicely within the new institutionalism literature. To date, empirical analyses of the post-confirmation relationship between the executive branch and justice voting behavior is rare. The research that has addressed the topic has focused on the Court's treatment of executive agency power (Silverstein and Ginsberg, 1987, and Yates, 1999). Andrew Martin (2006) expands this research by offering evidence of a link between the ideology of the current president and the voting behavior of current justices serving at the same time. However, his work examines the relationship between sitting presidents and the current justices as an indicator of the influence of executive preferences, while this work will focus specifically on the relationship between specific appointing presidents and the justices they appoint.

Lawrence Baum (1992) found strong evidence that membership change on the Court did lead to collective voting changes in civil liberties cases over 40 years. But he cautioned that change in the voting behavior of the remaining justices played a role in these outputs (Baum, 1992, 3). Thus, Baum suggests that while appointments to the Court will make an impact in the ideological outputs of the Court, the changing preferences of the other justices are also responsible for this result; it is not simply the result of membership change. Hence, Baum (1992) describes the importance of considering justice long term policy voting for presidents. He also provides insight into the notion that presidents who desire to see their preferences manifested on the Court need to appoint justices as closely aligned as possible to themselves as a potential check on the future appointments of a justice-president dyad that is ideologically opposed to his preferred outcomes.

Along these lines, Krehbiel (2007) found that in making Supreme Court appointments, the president is acting as an “agenda setter who uniquely possess the right to initiate policy or to

appoint policy makers” (Krehbiel, 2007, 231). He also finds, however, that while there is consensus that appointments to the Court have long term consequences for policy in the aggregate, that there is no consensus about the immediate impact of individual appointments to the Court in the short term (Krehbiel, 2007, 238). Consistent with these findings, I will then consider the career voting of score of each justice in Model 3.3 and in the president-specific analysis offered in Table 3.4. As the previous literature has suggested, the Bailey justice career average score is likely the one that presidents would be most concerned with as it reflects the potential long term policy impacts of their judicial appointments.

#### *Dependent Variable*

I conduct a regression analysis using each justice’s Bailey ideal point as the dependent variable. This model examines career data, and thus only justices for whom total career data is available are considered in Model 3.3. The Bailey data from 1950-2008 allow for an examination of 23 justices for which presidential scores for comparison are available. I create career scores by averaging yearly ideal point values in the Bailey dataset; thus creating a dependent variable called *Bailey career average score*. The values on *Bailey career average score* range from -1.69 -1.13, with a mean of -.151. As a reminder, liberalism is represented by negative numbers and conservatism by increasingly positive numbers. The scores for each justice in this study are listed in Table 4.5. Bailey also offers compatible ideal points for presidents and members of Congress, which I also consider in this model. For a complete discussion of the Bailey ideal points, revisit Chapter 1 of this dissertation. Ultimately, a regression model using *Bailey career average score* as the dependent variable (Model 3.3) is created.

### *Independent Variables*

The key independent variable is *Appointing president's ideology score*. In Model 3.3, I make use of the Bailey ideal point scores to capture the ideology of the appointing president. These scores are derived from Bailey's assessment of presidential positions on Supreme Court cases (Bailey, 2007). I anticipate based on the literature that there is a link between presidential ideology and career justice ideal point. This expectation leads to Hypothesis 1—that there is a direct positive relationship between *Appointing president's ideology score* and *Bailey career average score*. The Bailey scores for presidents in this sample range from -1.37 (Kennedy) to 1.15 (Reagan), with a mean of .182. The Bailey scores for specific presidents are listed in Tables 3.4 and 4.5.

In addition to the key independent variable, Model 3.3 also includes three control variables. The first is *Appointing president's approval rating*, which represents the Gallup approval rating for the appointing president at the closest day available preceding a justice's confirmation vote in the Senate. As Eisgruber points out, "A powerful and popular president may be able to push through his preferred candidate without regard to what opposition senators think" (Eisgruber 2007, 15). As mentioned previously, Segal and Spaeth observe that presidents with high approval ratings (defined as above 70 percent) are able to secure, on average, 98 percent of Senate votes for their nominees. Similarly Johnson and Roberts (2005) note that a high approval rating can help a president overcome a hostile Senate and secure confirmation for a preferred Court nominee. Because this work addresses the link between the appointing president and the subsequent voting behavior of his Supreme Court appointments, I control for the value of the

*Appointing president's approval rating* at the time of a justice's confirmation vote. Overall, the mean for this variable is 59.5 percent and the range is 38 percent - 84.5 percent.

Next, I include a control variable that accounts for the possibility that a president is less likely to win confirmation of an ideologically compatible justice when he is faced with a hostile Senate. This variable is called *Appointing president's distance to filibuster pivot*, and measures the distance between the appointing president's Bailey ideal point and the Bailey ideal point of the Senator holding the position of filibuster pivot at the time of the confirmation vote. This variable was created by Dr. Hemant Sharma, who generously made this variable available for this project. Dr. Sharma creates the *Appointing president's distance to filibuster pivot* variable by ranking the Bailey ideal point scores of all senators serving during a given session. After the scores are ranked, the potential cloture vote for ending a filibuster is located. In cases prior to 1975, this "filibuster pivot" resides at the 67<sup>th</sup> (or 33<sup>rd</sup>) percentile, because before 1975, a 2/3 standard was needed to invoke cloture. In cases after 1975, when the standard was changed by an act of Congress, the 60<sup>th</sup> (or 40<sup>th</sup>) percentile is located. The Bailey ideal point score of that pivotal senator is then subtracted from the president's Bailey ideal point score and the absolute value of the difference is *President's distance to filibuster pivot*. The mean for this variable is 1.03, with a range of .128 - 2.02.

Use of this variable specifically targets the advantage offered when a president has a significant majority in the Senate, which is of course the possibility of ending any potential filibuster of a controversial nominee (see, among others: Johnson and Roberts 2004). Ultimately, this filibuster-proof majority could enable a president of the same party to nominate a more ideologically compatible candidate. Meanwhile, a strong majority of the opposite party could

stifle the nomination of any preferred justice. Historically, filibusters of Supreme Court nominations are rare, yet “relative to all other positions in the executive branch, the Senate is far more likely to turn back candidates for the Supreme Court: since 1789 it has rejected only nine nominees for cabinet post but about one out of every five would-be justices” (Epstein et al., 2007, 1500).

Finally, I include *Previous years as federal judge*. This variable reports the number of years a nominee served as a federal judge before he/she is confirmed to the Supreme Court. This variable is included as a potential clue into future judicial voting behavior for presidents prior to making a nomination. As Baum explains, the potential value of a previous record is that “a prior judicial record helps presidents and their advisers to predict the positions that prospective nominees might take as justices” (Baum, 2007, 60). Theoretically, the importance of this measure is maximized when we consider the vague answers provided by nominees during their confirmation hearings. The expectation is that those who have served as federal judges prior to nomination would have provided evidence of their preferences during this service, evidence presidents theoretically consider in their search for a like-minded individual to fill an opening on the Court. Thus, this variable is included as a control variable in the selection process. I do not expect to find an ideological relationship between years served and *Bailey career average score*. The mean for this variable is 3.43 years and the range is 0 -15 years.

## *Model*

Using this dataset I test the following GLS random effects regression model

### Model 3.3:

$$Y \text{ (Bailey career average score)} = x1 \text{ (Appointing president's ideology score)} + x2 \text{ (Appointing president's approval rating)} + x3 \text{ (Appointing president's distance to filibuster pivot)} + x4 \text{ (Previous years as federal judge)} + u$$

## *Results*

Table 3.3 contains the results of Model 3.3. As hypothesized, there is strong evidence of a positive relationship between the appointing president's ideology score and the voting scores of Supreme Court justices. In short, as the president's ideology score becomes more conservative, so too will the ideology score of his Supreme Court appointments. This relationship is statistically significant at less than a .01 probability level. Therefore, the basic findings offered by Segal et al. (2000) comparing "Presidential Scholars Scores" to voting scores from the Spaeth database are reinforced by Model 3.3 with ideology scores crafted in the same scale. Based on this finding, Hypothesis 1 is verified.

**Table 3.3: Supreme Court Justice Career Average Score and Appointing President  
Congruity, 1950-2008**

Independent Variables	<u>Model 1.</u> Dependent Variable= <i>Bailey Career Average Score</i>
<i>Appointing president's ideology score</i>	.7299*** (.153)
<i>Appointing president's approval rating</i>	.0205 (.014)
<i>Appointing president's distance to filibuster pivot</i>	.3301 (.271)
<i>Previous years as federal judge</i>	.0271 (.028)
Constant	-1.878* (.911)
F-ratio	6.03***
Number of Justices	23
R-Squared	.57
Adjusted R-Squared	.48

Note: Standard errors for independent variables in parentheses; two-tailed test;

\*p<.10; \*\*p<.05; \*\*\*p<.01

Overall, Model 3.3 finds that presidents have success when it comes to having an ideological impact on the Court. Yet Model 3.3 also shows no significant relationship between the justice career voting score and the control variables in the study. This is consistent with findings presented later in this dissertation. The lack of a relationship between years served in the federal courts is also consistent with other findings in this work, and suggests that presidents are either getting their information about judicial positions elsewhere or that the president's influence impacts judicial voting regardless of previous experience. Table 3.3 also shows no impact of the president's ideological relationship with the Senate's filibuster pivot and the career voting outputs of the justices they appoint to the Court. Ultimately, Model 3.3 reveals the strength of the unique relationship between the preferences of appointing presidents and the justices they nominate to the Court.

### *President-Specific Results*

To continue replicating Segal et al.'s (2000) assessment, the results of individual presidents' success in the appointment process are reported. Table 3.4 displays each president's Bailey score and the average Bailey ideal point score of all of his appointments. Presidents are ranked based on the degree of absolute value difference between their Bailey ideal point score and the average of the career score of each of the justices they appointed. Those exhibiting a smaller difference are listed first, as they are most successful at appointing justices with similar preferences to the Court. This table illustrates that of the presidents in this study, Clinton is the most successful president and Ford is the least successful at appointing like-minded justices to the Supreme

Court. It should be noted, however, that Ford's lone appointment of John Paul Stevens is responsible for this low ranking. Also, Ford is the only president in this study to make only one appointment. George W. Bush is the second most successful president, although we must note that his appointments still have much time to serve on the Court, so this ranking could be altered in future studies of a similar undertaking. The absolute distance in terms of Bailey ideal points for each justice and their appointing president is reported in Table 4.5.

Eisenhower, who made the most appointments of the presidents in this study, ranks fourth in Table 3.4, bolstered by his close ideological relationship with Potter Stewart, but hindered by the strong liberal voting patterns of Earl Warren and William Brennan. Interestingly, George H.W. Bush is second-to-last on this list due mostly to the behavior of Justice Souter. This gap was the widest for any pairing within the sample. To further illustrate the impact of this distance, consider that George H.W. Bush's other appointment to the Court, Clarence Thomas, is aligned closer to him than any other pairing in this dataset.

Perhaps most telling in Table 3.4 is that all of the Republican presidents in this study have an ideal point score that is more conservative than the collective average career score of the justices they appointed. It is also worth noting that of the presidents who were Democrats, Clinton and Kennedy appointed justices who collectively voted more conservatively than their ideal point alignment, while Johnson's nominations were far more liberal than he. This suggests that Lyndon Johnson is unique in his relationship with his appointments to the Court, as he is only executive more ideologically moderate than his appointments to the Court. Johnson also shows the least amount of variance in his appointments, as Abe Fortas and Thurgood Marshall career voting scores are nearly identical with Fortas at -1.61 and Marshall at -1.618.

**Table 3.4: Ideological Congruity Between Presidents and Their Supreme Court Appointments, 1950-2008**

President (Number of Appointments)	President's Bailey ideal point Score	Average Career Bailey ideal point Scores of President's Appointments	Absolute Value of Difference
Clinton (2)	-0.877	-0.716	0.161
Bush II (2)	1.11	0.815	0.295
Nixon (4)	0.835	0.479	0.356
Eisenhower (5)	-0.049	-0.428	0.379
Reagan (3)	1.15	0.581	0.569
Johnson (2)	-1.05	-1.62	0.570
Kennedy (2)	-1.37	-0.796	0.574
Bush I (2)	1.11	0.246	0.864
Ford (1)	0.781	-0.894	1.675

*Conclusions*

In this study, I aim to demonstrate the relationship between the career voting positions of Supreme Court justices and their appointing president. Previous studies in this work have demonstrated support for new institutionalism as it applies to the impact Congress, the White House, and the Court itself when *Justice-independent Court median* is considered, on the yearly voting scores of justices. Yet in this section, I explore the more precise impact of the relationship between appointing presidents and the career voting of Supreme Court justices, a better measure of the long term impact presidents hope to have on the Courts direction.

The results of Model 3.3 clearly demonstrate that presidents tend to appoint like-minded justices to the Supreme Court. This result is pleasant news for presidents and those who champion the new institutionalism approach to the study of judicial behavior. The control variables included in Model 3.3 show no relationship to the career voting scores of justices; this indicates the strength of the bond between justices and their appointing president. In short, I observe that as the ideology of a president becomes more conservative, so too will the career voting score of the justices he appoints to the Supreme Court.

In all, my findings mirror those of Segal et al. (2000). In short, I agree that “judicial appointments can provide policy-minded presidents with an enduring legacy long after their terms are through” (Segal et al., 2000, 557-558). In terms of president-specific results, however, there are several differences between my work and that of Segal et al. (2000). There are several reasons for these discrepancies. First, Segal et al. (2000) considered the presidents (and the justices they appoint to the Court) from Franklin Roosevelt through Clinton, while my model begins with Eisenhower and includes George W. Bush. Second, my study also contains data through 2008, providing more time for many justices in the study to make decisions that alter their career data that was initially used by Segal et al. Third, the previous study considered presidents’ relationship to justice voting in certain issue areas (civil liberties and economics), while my study, through use of the Bailey ideal points, accounts for positions of justices and presidents made on all cases.

In light of these factors there are several differences in ranking the presidents in terms of the congruity displayed by their judicial appointments. Both studies rank Bill Clinton as the top president at appointing like-minded justices, and both have Johnson, Kennedy and Ford ranked

in the bottom tier of presidents. It is interesting to note the differences between Segal et al.'s (2000) ranking of Reagan and George H.W. Bush. They were ranked second and third, respectively, in the previous study, yet Table 3.4 list Reagan fifth and Bush second to last. The explanation for this slide of these two conservative presidents is most likely the continued increase in liberal voting after the Segal et al. (2000) study of justices Kennedy and O'Connor which impacted Reagan's rank, and the strong liberal voting of David Souter. These differences highlight two important aspects of an undertaking such as this—the fluidity of judicial voting behavior, and the importance of considering appointments as long-term political influences, not yearly or short term impacts.

Ultimately, this chapter reveals much about the nature of judicial voting behavior. Initially, making use of panel data I find support for new institutionalism, observing an ideological relationship between Congress and the president and Supreme Court justice voting outputs. Next, I discover that the rational choice approach to judicial politics has merit as well, as there is a strong relationship between the preferences of the other justices on the Court and a justice's behavior. This finding makes an interesting addition to the judicial bargaining literature by showing that the direction of this relationship is counterintuitive. Finally, in the previous section of Chapter 3, I see that when we consider career data, there is a strong positive relationship between the ideology of Supreme Court justices and the preferences of their appointing president. Collectively, these findings transition nicely into Chapter 4, which will focus exclusively on this relationship between Supreme Court justices and their appointing presidents.



## **I V . P R E S I D E N T S A N D J U S T I C E S**

In this chapter, I examine the relationship between Presidents of the United States and the men and women they appoint to the United States Supreme Court. Studying the same group of actors that I examined in Chapter 3—those justices that served from 1950-2008 and Presidents Truman through George W. Bush—I aim to explore the impact of outside political phenomena on a president’s ability to appoint like-minded justices to the Court. I do so by examining multiple facets of the relationship between Supreme Court justices and their appointers. First, I examine the constraints placed on presidents at the time of appointment. I begin by examining the general impact of political appointment conditions on a president’s ability to appoint like-minded justices to the Court. Second, I narrow this study by exploring the effects of presidential political capital (measured by public approval rating) when making a nomination to the Court. Finally, I explore how the total number of terms served on the bench affects the relationship between presidents and the justices they appoint to the United States Supreme Court. This section is an update to the literature concerned with the “acclimation effect.”

Ultimately, this chapter suggests that even after controlling for outside political constraints, presidents are largely successful in appointing ideologically-aligned judges to the Supreme Court when appointment conditions are in their favor. However, a president’s ideological impact on the Court is tempered over the long-term tenure of a justice’s career. This observation is based on the finding that justices behave with increasing independence as their tenure on the Court progresses.

## **A. Presidential Appointment Conditions**

Pursuant to Dahl's (1957) concern about the link between judicial behavior and democratic processes, I examine the relationship between appointing presidents and Supreme Court justices. I do so using ideal points that place all actors on the same scale, and while controlling for factors that constrain presidential selection. I find evidence of a strong connection between certain pre-appointment indicators and the ideological distance between presidents and the justices they appoint to the Court. This work also finds a link between this ideological distance when changing political realities in the White House and the Congress are accounted for as well.

I accept a basic conclusion that most scholars accept—that when faced with filling an opening on the Court, the president will nominate an individual as ideologically similar to himself as possible (Yates, 1999). A second major conclusion in the judicial literature is what Epstein et al. (2007) refers to as “the assumption of stability.” This is the idea that justices arrive at the Court with firmly entrenched ideological outlooks, and that these preferences will not change during their tenure. This research will address both of these conclusions. I will argue that the first conclusion is clearly supported by the data (Abraham, 2008). The second conclusion, however, is rejected. In this I concur with others (see, specifically: Hurwitz and Stefko, 2004, Epstein and Segal, 2005, Epstein et al., 2007) who find that justice voting behavior does in fact change or “drift” over time. I test both of these conclusions with a single model. I examine appointment conditions that potentially constrain presidents in appointing like-minded judges while controlling for additional political phenomena that could cause ideological distance between the two actors. This approach is consistent with the new institutionalism, a view of judicial behavior that describes justices as political actors aware of and responsive to the

preferences of other political institutions. In short, I ask what appointment conditions and which yearly political conditions combine to affect the ideological distance between a Supreme Court justice and his/her appointing president.

Ultimately, I discover that presidents can obtain evidence about which justices will drift before they are nominated to the Court. Specifically, presidents can look to certain pre-confirmation conditions that serve as strong predictors of future judicial “drift.” Further I discover that yearly ideological changes in the Congress and the White House are correlated with future changes in justice behavior as well. This examination provides a unique study of the relationship between justices and their appointers by accounting for both conditions at the time of appointment and yearly changes in the political environment that can alter judicial voting behavior.

### *Literature Review*

Epstein et al. (2007) report that the notion of “entrenchment” is based on the idea that executives can extend their ideology into the judiciary at the time of a judicial appointment and that this influence will last the length of the justice’s tenure (Epstein et al., 2007, 1499). In studying concordance between justices and their appointing president Segal, Timpone and Howard (2000) speculated that presidents attempt to have an enduring policy influence by appointing like-minded justices to the Supreme Court (Segal et al., 2000, 557). The authors then found that presidents by and large have been successful in doing so: “It seems reasonable to

conclude that presidents since Franklin Roosevelt have been fairly successful from a policy standpoint in their Supreme Court appointments” (Segal et al., 2000, 569).

Some scholars have built on these findings, surmising that in addition to the opportunity for long term policy impact, appointments to the Court also represent opportunities for presidential agenda setting (Krehbiel, 2007). All of these findings offer strong support for the same conclusions of earlier works (see: Dahl, 1957, Scigliano, 1971, Rohde and Spaeth, 1976, Heck and Shull, 1982). In sum, previous studies have strongly supported the notion that presidents view judicial appointments as chances to influence the ideological output of the Supreme Court.

Turning to the second conclusion—that of judicial ideological drift—I will begin by describing the rationale of those who support the proposition that judicial preferences are stable, then describe empirical studies of the same claim. Scholars who reject the judicial drift assumption assert that: “Intuitively, it seems implausible to believe that justices would take pause to rethink their presumably well entrenched beliefs over matters jurisprudential” (Epstein et al., 2007, 1489). The work of popular scribes who follow the Court shows further support for stability. Speaking of Justice Roberts’ appointment, David Strauss in the *Chicago Tribune* was dismissive of the notion that once on the Court, Roberts may develop into something other than the conservative he was perceived to be. “Don’t believe it,” Strauss said (Strauss, 2005). Further support for the theory of the stability of judicial attitudes comes from high rates of correlation found between the Segal/Cover pre-confirmation ideological scores for justices and their directional voting once on the Court (Segal and Spaeth, 2002, Epstein and Segal, 2005).

Yet there remains a problem with the idea that judicial behavior is stable; sophisticated empirical studies consistently reveal it to be false. “The results could not be clearer: contrary to the received wisdom, virtually every justice serving since the 1930s has moved to the left or right, or in some cases has switched directions several times” (Epstein et al., 2007, 1486). This finding of judicial “drift” has been confirmed by numerous other scholars. Hurwitz and Stefkó (2004) report that voting behavior is indeed measurably different at various stages in a justice’s tenure on the Court. They find that voting behavior is not a stable judicial activity, but rather changes over time. Similarly, Segal et al. (2000) observe a shift in congruence between justice ideology and presidential ideology as each justice’s service on the Court continues. Like Hurwitz and Stefkó, they classify judicial tenure in blocs (1-4 years, 5-10 years, 11-20 years, and 20+ years), but their findings go beyond general ideological drift. In sum, Segal et al. (2000) explain that “the substantive relationship between presidential policy preferences and justice behavior declines over time” (Segal et al., 2000, 567). These results further indicate that time served by a justice can have an impact on the ideological relationship with his or her appointing president. Examining judicial voting behavior from 1937-2005, Epstein et al. (2007) find that only four justices (Breyer, Murphy, Stewart and Thomas) show no signs of ideological drift. The other 22 justices in their study show substantial drift, with 12 trending left, seven trending right, and three (Burger, Douglas, and Harlan) moving both left and right (Epstein et al., 2007, 1504). In short, research indicates that drift is a nearly unavoidable reality presidents must contend with in the selection process.

Still the research leaves part of the puzzle unanswered. Epstein et al. (2007) limited their study to only those justices who had served ten terms or more on the Court within the time

period they studied. I will account for all justices from 1950-2007 regardless of their tenure length to avoid any selection bias. Epstein et al. (2007) report that “Senators and the president can be reasonably certain that the justice they appoint will behave in line with expectations—at least during the justice’s first term in office” (Epstein et al., 2007, 1521). Yet, they caution that “ten years after appointment, the picture clouds considerably.” The authors observe a noticeable change in the initial preferences of the justices after 10 years on the Court (Epstein et al., 2007, 1523). This finding highlights the need for studies of judicial behavior that account for political conditions at the time of appointment and over time, to properly examine the relationship between justices and their appointing president.

Before I go any further I will describe what I mean by “drift” and “distance.” Judicial *drift* describes the change over time in the ideological preferences of a justice. This manifests itself in both yearly “drift” changes (relative to the previous term) and career changes (the drift from a justice’s first year on the Court and their last). *Distance* is the difference between a justice’s ideal point and that of another actor (in this study, his/her appointing president). One can calculate a yearly distance score and a career distance score for every justice in this study as well as a yearly drift score and career drift score. The terms are at times used interchangeably in other works, but remain mutually exclusive of one another in this research.

### *Data and Hypotheses*

To assess levels of ideological distance between justices and their appointing president, I will conduct a panel analysis using Michael Bailey’s ideal points. As I stated earlier, Bailey’s

measures are preferred to others because each justice is scored on the same numerical plane measured across time and institutions (Bailey, 2007). To account for variation across institutions, Bailey established a data set of presidents and members of Congress. These data account for the ideological preferences of these actors on issues pertaining to Supreme Court cases. To account for variation across time, Bailey makes use of “cut point” locations and employs Bayesian Markov Chain Monte Carlo methods. For a full explanation of Bailey’s methods, see: Bailey (2007). (The scores for all actors and institutions were updated in 2009 in *The Constrained Court* by Michael A. Bailey and Forrest Maltzman).

#### *Dependent variable*

I create my dependent variable by using Bailey ideal point representations of justice and presidential ideology. Bailey creates each justice’s ideological score for every term served on the Court. The appointing president’s ideal point at the time of appointment is constant. *Justice yearly distance score* is calculated by subtracting the yearly ideal point for each justice from his or her appointing president’s ideal point at the time of the appointment. The absolute value of this distance is the *Justice yearly distance score*. This variable has a mean of 0.745 and a range of 0.00 - 2.42.

### *Independent variables*

In Model 4.1, I examine the effects of four environmental variables in an attempt to test several hypotheses drawn from new institutionalism. Each of these variables represents political phenomena that potentially can affect the ideological distance between a justice and his or her appointer. The first of these independent variables is *Replaced justice of same party*. This dichotomous variable is coded “1” when a conservative (liberal) judge is appointed to fill an opening on the Court that was vacated by a conservative (liberal) judge and “0” otherwise. This variable is created using the pre-confirmation ideology scores developed by Segal and Cover (1989). Justices with a Segal/Cover ideology score between 0 and .50 are considered conservative, and those with a Segal/Cover score between .51 and 1 are coded as liberal. In this data set 16 of the 27 justices were coded “1” for replacing those with similar ideology.

Hypothesis 1 is that there is a negative relationship between *Replaced justice of same party* and the dependent variable. I anticipate that the appointment of a justice who is not replacing a justice of similar ideology represents a dynamic shift in the Court’s ideology—one orchestrated by the president. This is often the by-product of strategic judicial retirements (Hansford et al., 2010). The theory here suggests that justices will not leave the Court until they are confident that a justice with similar preferences will be nominated to replace them. Thus, a justice appointed to replace a justice of similar ideology will be more closely aligned with his/her appointer. In kind, I will observe more distance between a justice and his or her appointing president when the seat is filled by a justice with differing ideological preferences than his/her predecessor.

Second, I account for information about potential nominees that presidents can gain from justices having previous judicial experience. *Previous years as a federal judge* is a numeric count of the number of years a judge served in the federal judiciary before being appointed to the United States Supreme Court. Some scholars suggest that judges with lots of judicial experience offer substantial information about their likely behavior as Supreme Court judges based on their voting behavior in lower federal courts (see, generally: Comiskey, 2004, Abraham, 2008). Because of this “ideological trail” left by justices with previous experience on the bench, Hypothesis 2 predicts that there is a negative relationship between *Previous years as a federal judge* and the dependent variable. In other words, I expect to find less drift from judges who have served longer tenures in the federal courts than those who have not.

*Divided government appointee* is a dichotomous variable that takes a value of “1” if a judge is appointed under conditions of divided government, and a “0” otherwise. Here, I define divided government as any year when the president’s party is different from the majority party in the Senate. Previous studies have found that the presence of divided government at the time of an appointment is a significant predictor of judicial voting behavior (Richardson and Scheb, 1993). In this dataset, 12 of the 27 justices are divided government appointees. Hypothesis 3 predicts that there is a negative relationship between *Divided government appointee* and the dependent variable. Hypothesis 3 is based upon the idea that a justice appointed under conditions of unified government will begin his/her tenure closely aligned with his/her appointer, only to drift over time, whereas a justice appointed under conditions of divided governments began ideologically disparate from his/her appointer, numerically drifting less as a result of this initial separation.

This is my expectation because presidents will be required to nominate to placate a more hostile Senate under condition of divided government (Richardson and Scheb, 1993).

Next, I attempt to account for the quality of each justice by testing the effects of each justice's *Segal/Cover qualification score*. In theory, a president looking to fill a Court vacancy will consider judicial quality (Epstein et al., 2007, 1490). Senators, in turn, may also be more inclined to confirm a selection that is perceived as being highly qualified. The qualification score is based on analysis of pre-confirmation newspaper editorials regarding the nomination of each justice. Hypothesis 4 suggests that there is a positive relationship between *Segal/Cover qualification score* and the dependent variable because more qualified justices will feel emboldened to advance their own preferences than less qualified justices will. The latter, I predict, will remain cognizant of, and aligned with, the preferences of the individual who placed them on the Court (Abraham, 2008). This is my expectation as greater levels of qualification are often considered synonymous with greater level of judicial independence which is reflected in increased drift from their appointer. Each justice in the dataset is assigned a score between 0 (unqualified) and 1 (most qualified). *Segal/Cover qualification score* has a mean of .811 and a range of .125 -1.0.

Model 4.1 also takes into account the potential institutional effects of other political actors on the behavior of Supreme Court justices. Thus, one of my independent control variables is *Yearly presidential ideal point*. This score is taken from Bailey and is on the same scale as all the others used in this dissertation. This measure is different from the ideal point of the appointing president used in the creation of the dependent variable; it is not a constant, as it changes to reflect the ideal point of the current president. Andrew Martin (2006) observed that

justices were aware of presidential preferences and moderated their behavior in accordance. Martin's findings suggest that justices are in fact affected by the preferences of the chief executive. Model 4.1 accounts for this influence by controlling for *Yearly presidential ideal point*. The scores are unique to each president, yet Bailey provides only one score for each president; so, for example, the score is the same for Reagan in 1982 as it is in 1987. This variable ranges from -1.68-1.15, with a mean value of .109.

Finally, *Congress median* serves as a second institutional control variable in Model 4.1. *Congress median* is the yearly median ideal point of the legislature. Epstein and Knight quote Walter Murphy as writing that justices are willing to moderate their views to avoid extreme reactions from Congress (Epstein and Knight, 2004). Here, I control for this potential influence on judicial voting behavior. *Congress median* has a range of -0.3315-0.8185, and an average of 0.032.

#### *Model*

Model 4.1 is specified as a GLS, random effects time series regression model.

#### Model 4.1:

$$Y \text{ (Justice yearly distance score)} = x1 \text{ (Replaced justice of same party)} + x2 \text{ (Previous years as a federal judge)} + x3 \text{ (Divided government appointee)} + x4 \text{ (Segal/Cover qualification score)} + x5 \text{ (Yearly presidential ideal point)} + x6 \text{ (Congress median)} + u$$

## *Results*

As predicted in Hypothesis 1, justices that replace judges of a similar ideology have significantly less yearly drift in the ideological distance from their appointing president. This is the case because when replacing justices of a similar ideology, the leanings of the president at the time and the new justice highly correlate with the outgoing justice. In short, when a liberal retires from the bench, a Democrat in the White House will appoint a liberal to fill the seat. As such, we would anticipate there to be less ideal point distance between the two. If a Republican were in the White House when a vacancy was created by a retiring liberal justice, the replacement is more likely a conservative and *Replaced justice of same party* would be coded as a zero. This finding is both a reflection of and a contribution to the literature focused on strategic judicial retirements (Krehbiel, 2007 and Hansford et al., 2010).

In terms of judicial experience, Table 4.1 shows that there is no significant relationship between the number of years a justice has served as a federal judge prior to his/her nomination and the dependent variable. This finding suggests that presidential knowledge of previous experience is not related to yearly distance from the appointing president's ideal point. While other pre-confirmation variables such as the Segal/Cover qualification measure may forecast potential drift of justices, the number of years served on the federal bench does not. Thus, I reject my second hypothesis.

**Table 4.1: Supreme Court Justice Ideological Distance, 1950-2008  
(GLS, Random-Effects Time Series Regression)**

Independent Variables	Dependent Variable = <i>Justice yearly distance score</i> <i>b</i> ( <i>se</i> )
<i>Replaced justice of same party</i>	-.4881** (.219)
<i>Previous years as a federal judge</i>	.0326 (.025)
<i>Divided government appointee</i>	-.3746* (.224)
<i>Segal/Cover qualification score</i>	-.9459** (.476)
<i>Yearly presidential ideal point</i>	-.1558*** (.043)
<i>Congress median</i>	-.1383** (.224)
Constant	2.819*** (.444)
Justices	27
Total justice terms	449
Rho	.8627
Wald chi-squared	31.64***

Note: \*p<.10; \*\*p<.05; \*\*\*p<.01 (two-tailed tests).

Table 4.1 reveals that *Divided government appointee* is weakly statistically significant in the negative direction. This result verifies Hypothesis 3. In short, it appears that justices appointed under conditions of unified government will begin their careers more closely aligned with their appointing president than will justices appointed under conditions of divided government, but will then drift over time (a result tested further in Model 4.4). Justices appointed under conditions of divided government begin ideologically disparate from their appointer and distance themselves less by comparison as a result of this initial separation.

Next, Model 4.1 shows that *Segal/ Cover qualification score* is significantly related to the dependent variable. However, the relationship is a negative one, and thus I reject hypothesis 4. Contrary to my expectations, the justices declared by Segal and Cover as most qualified do not drift in their distance from their appointers once serving on the Court. In fact, this finding suggests that the opposite is true. The data indicate that well qualified justices drift less than lesser qualified justices. Perhaps this is the case because these justices are more resolute in their positions initially, and thus are less likely dramatically to alter the ideological distance from their appointing president. This finding requires further study (see: models 4.2 and 4.3), but suggests that justices perceived to be highly qualified are more stable in their preferences than those determined to be less qualified.

Finally, I turn to the two new institutionalism control variables included in Model 4.1. Bailey's *Yearly president ideal point* and Bailey's *Congress median* are both significantly related to the dependent variable. The negative coefficient for each variable suggests that as the president and the Congress become more conservative, justices drift less. There are many possible explanations for this. Perhaps increasing conservatism in the Oval Office and in

Congress causes those aligned with both parties to return to their ideological roots. This finding is one that requires much further research.

Overall, in Model 4.1 I discover a statistically significant relationship between five of the six independent variables. My findings suggest that there are certain appointment conditions and pre-confirmation situations under which presidents can be relatively confident that their nominees will not drift substantially over time. Additionally, my results support the theory of new institutionalism that suggests justices' voting behavior is affected by the political environment within which they adjudicate.

### *Conclusions*

The results of Model 4.1 bolster previous work that suggests various appointment conditions can constrain a president's ability to appoint a justice with similar ideological preferences. Model 4.1 highlights the impact of several of these conditions. Not surprisingly, it appears that a justice who is appointed to replace a justice of similar ideology is less likely to distance him/herself from his/her appointing president. Similarly, the justices in my study who are appointed when there is divided government drift less than those appointed under unified government. This finding provides further evidence for the idea of judicial instability. I also find that justices who are conceived to be of the highest qualifications before reaching the Court are more stable in their preferences over time, while those justices who are thought to be less qualified behave with less consistency. Additionally, the findings of this section offer support for the new institutionalism scholars who posit that other political institutions and actors affect the voting

behavior of Supreme Court justices. I say this because of the significance of *Congress median* and *Yearly presidential ideal point*. The finding of a strong link between increasing conservatism in these political institutions and a decrease in the drift from their appointing president's preferences across all the justices in this study is one that has far reaching implications, and though beyond the scope of this work certainly requires elaboration in a subsequent study.

## **B. Presidents and Political Capital**

Building on of the findings in the previous section, I will now examine the relationship between levels of presidential political capital and the ability of presidents to appoint justices to the Supreme Court who are ideologically aligned with their preferences. In short, I ask: Do Presidents with high public approval ratings have greater success in appointing justices who are ideologically aligned with their own preferences than presidents with low approval ratings? The literature suggests that the answer to this question is “yes” because popular presidents have a strong position *vis a vis* Congress. A president with a relatively high approval rating should be able to appoint a justice closely aligned with his preferences while expecting less interference from the Senate. Herein, I test multiple sources of capital while controlling for outside political actors and phenomena consistent with the new institutionalism literature. This research attempts to address questions about president’s ability to appoint like-minded justices to the court, and aims to discover pre-confirmation indicators of future ideological “drift” of justices.

In this section, I explore how individual characteristics affect the distance between a judge and his/her appointing president. Specifically, I examine the effects of pre-nomination qualifications, and judicial role perception. My findings suggest that presidents concerned that justices may “drift” away from them ideologically may want to consider the potential impact of previous positions and perceptions of judicial quality prior to nomination. Ultimately, I find little evidence linking political capital to ideological distance. Interestingly, however, I find that there is a connection between ideological distance and certain pre-confirmation characteristics of judges. Additionally, when panel data is considered I find that for individual justices ideological distance is constrained by congressional preferences and intra-Court influences.

## *Literature Review*

New institutionalism describes justices as politically aware of, influenced by, and perhaps even directed by, the preferences of other political actors. Justices then craft opinions of the Court with the actions of other institutions in mind (Gillman and Clayton, 1999). In sum, this branch of judicial politics investigates how individual justices, as well as the judiciary as an institution, interact with the other branches of government and other political actors. Because this research is concerned with the relationship between presidents and the justices that they appoint to the United States Supreme Court, it fits nicely within the new institutionalism literature.

Previous new institutionalism studies have focused primarily on the relationship between Congress and the courts. Epstein and Knight quote Walter Murphy as saying that justices will be willing to moderate their views to avoid extreme reactions from Congress (Epstein and Knight, 2004). Similarly, Andrew Martin suggests that the powers of Congress to act against judicial activity are impressive. These powers are impressive indeed, and include the power to impeach and remove justices, and to propose constitutional amendments (Martin, 2006).

Examinations of the relationship between justices and their appointing presidents are not numerous. There is a line of research that examines the pre-conformation relationship between justices and appointing presidents (see Segal and Cover, 1989), and there are multiple studies that examine early loyalties of justices to their appointers (Bowen and Scheb, 1993, Hurwitz and Stefko, 2004). Yet there are far fewer analyses of the post-confirmation relationship between the executive branch and long term justice voting behavior. Andrew Martin (2006) was the one of the first to offer evidence linking the ideology of the current president and the voting behavior of

justices. He finds that there is a positive relationship between presidential preferences and Supreme Court voting behavior. In all, however, we know little about the relationship between justices and their appointing presidents.

Assessing the impact of presidential ideology on the behavior of Supreme Court justices, Johnson (2003) finds evidence that justices seek out information regarding executive preferences through the United States Solicitor General. This finding is furthered by Bailey et al. (2005), who note a level of congruity between the solicitor general's positions and those of Supreme Court justices. Building upon this finding, there is strong theoretical rationale to envision a link between the appointing president's ideology and the voting behavior of a recently appointed Supreme Court justice. I attempt to further specify the connection between presidential and judicial preferences by examining the impact of approval ratings on judicial behavior.

Johnson and Roberts (2005) report that presidents with high approval ratings can achieve the appointment of their preferred nominees to the Court, even over the objections of a Congress controlled by the opposition party (Johnson and Roberts 2005). Segal and Spaeth (2002) note that presidents with high approval ratings (above 70 percent) historically have received an average of 98 percent of the Senate vote in favor of their nominees, while presidents with approval ratings lower than 50 percent are able to secure less than 80 percent of the Senate's favor. This percentage while high, is certainly lower than the near absolute certain confirmation afforded to presidents with approval rating above 70 percent. These studies begin to explore how the ideological congruity between presidents and justices is affected by presidential approval ratings. I further this line of research by examining the long term relationship between presidents

and the justices they appoint using ideal point measures which are valid across times and institutions.

Despite the findings of Segal and Spaeth (2002) and Johnson and Roberts (2005), little research has examined the specific connection between an appointing president's approval ratings and the subsequent voting behavior of Supreme Court justices they appoint. Yates (1999) found a positive relationship between the approval rating of a sitting president and justice votes on executive agency activity, but he focused on the influence of the current president not the appointing president, and only in specific case types. Here, I focus on the relationship between an appointing president and his spatial distance from the ideological scores of his Supreme Court appointments. Ultimately, I expect to discover a statistically significant difference in the level of ideological similarity between Supreme Court justices and their appointing presidents when their appointments are made when presidents have increased political capital. In this section, I will test this expectation in terms of a justice's career performance, and also account for potential yearly changes making use of panel data as well.

### *Data Sources and Hypotheses*

I conduct this analysis using each justice's Bailey ideal point. As described in Chapter 1 of this dissertation, I use the judicial ideal point measure created by Michael A. Bailey of Georgetown University. As a reminder, Bailey's measure is preferred as each justice is scored on the same numerical plane measured across time and institutions (Bailey, 2007). To account for variation across institutions, Bailey established a data set of presidents and members of Congress stating

an ideological preference on issues pertaining to Supreme Court cases. To account for variations across time, Bailey makes use of “cut point” locations and employs Bayesian Markov Chain Monte Carlo methods. For a full explanation of the techniques used by Bailey in creating his ideal point scores, see: Bailey (2007). (The scores for all actors and institutions were updated in 2009 in *The Constrained Court* by Michael A. Bailey and Forrest Maltzman).

### *Dependent Variables*

Ultimately, this research will explore two models of presidential appointment success. The first model will use data based on the entire career of the all Supreme Court justices who served from 1950-2008. Active justices, minus those added to the court after 2008, are considered as well (thus, a more accurate description for these seven justices would likely be “career score to date”). The second model will offer panel analyses based on yearly observations. There are a total of 27 justices in the study, and the same justices are examined in both models. I create the first model using *Justice career average distance score* as a dependent variable (Model 4.2), and the second using each justice’s *Justice yearly distance score* as the dependent variable (Model 4.3). *Justice career average distance score* is created by averaging the results of each justice’s *Justice yearly distance score* to determine their career ideal point score. Next, the *Justice career average score* is subtracted from a justice’s *Appointing president ideal point* at the time of appointment. The absolute value of this result is each justice’s *Justice career average distance score*. In Model 4.3, *Justice yearly distance score* is the yearly absolute value distance between the *Justice yearly score* and a justice’s *Appointing president ideal point* at the time of appointment. This is the

same dependent variable examined in Model 4.1 in the previous section. In short, Model 4.2 considers the career distance between justices and their appointing presidents, while in Model 4.3 I am concerned with the yearly distance between the two.

### *Independent Variables*

The key independent variable in each model is the appropriate *Appointing president's approval rating*, which represents the Gallup Approval Rating for the appointing president at the time of a justice's confirmation vote in the Senate. As Eisgruber notes, "A powerful and popular president may be able to push through his preferred candidate without regard to what opposition senators think" (Eisgruber 2007, 15). Thus, it seems logical to submit that a president's preferred candidate will mirror his ideological preferences. Accordingly, Hypothesis 1 suggests that there is a negative relationship between *Appointing presidents approval rating* and the dependent variable in both models. This is the case because I anticipate that the distance between a justice and his/her appointer will decrease as approval rating increases. The mean for this variable is an approval rating of 59.5 percent, and the range is 38 -84.5 percent. *Appointing president's approval rating* is considered in Model 4.2 and Model 4.3.

Next, I attempt to account for the quality of the justice appointed by making use of a justice's *Segal/Cover qualification score*. These scores are modeled less than the more famous Segal/Cover measure of pre-confirmation ideology of Supreme Court justices, yet are more appropriate in this context as a control for the perception of the quality of justices prior to their confirmation. The qualification score is based on analysis of pre-confirmation newspaper

editorials (Segal and Cover, 1989). *Segal/Cover qualification scores* range from 0 (for judges who are unqualified) to 1 (for judges who are most qualified). Hypothesis 2 posits that there is a negative relationship between *Segal/Cover qualification score* and the dependent variable in both models. I base this hypothesis on the finding in Model 4.1 that justices perceived as highly qualified have lower levels of ideological distance from their appointing president. *Segal/Cover qualification score* has a mean of .811 and a range of .125 -1.0.

Next, I consider the previous experience of justices. *Held elected office* is a dichotomous variable coded “1” if a justice ever served in an elected position prior to serving on the Court, and “0” otherwise. For example, Hugo Black served as Senator from the state of Alabama before coming to the court, while Justice Alito served positions such as district attorney in New Jersey, assistant solicitor general, and federal circuit court judge, but never served in an elected office. Theoretically, presidents are more familiar with the ideology of justices with elected office experience than with that of justices without such experience. Thus, Hypothesis 3 predicts a negative relationship between *Held elected office* and the dependent variable in both models. In these models, six of the 27 justices examined held elected office before serving on the Court. This variable is considered in both Model 4.2 and Model 4.3.

*Divided government appointee* is a dichotomous variable that takes a value of “1” if a justice is appointed under conditions of divided government, and “0” otherwise. This is the same representation used in Model 4.1. Previous studies show that conditions of divided government constrain presidents in appointing like-minded justices to the Court (Richardson and Scheb, 1993). With this in mind, Hypothesis 4 predicts a positive relationship between *Divided government appointee* and the dependent variable in Model 4.2. This is my expectation because

I anticipate that ideological distance between presidents and their appointees will increase when the appointment is made under conditions of divided government. This variable is only considered in Model 4.2, which is concerned with career performance, and for which the more precise measures of yearly congressional-judicial interactions made use of in model 4.3 are not appropriate. In this dataset, 12 of the 27 justices examined are classified as divided government appointees.

In Model 4.3, I use panel data to track yearly drift in the distance between each justice's yearly ideal point and his/her appointing president's ideal point. The institutional scores for the Congress and the Supreme Court are taken from the Bailey data and are recorded on the same scale as the ideal point values for presidents and Supreme Court justices. Again, a score of 0 is the ideologically neutral midpoint and increasingly negative numbers represent increasing liberalism, while increasingly conservative numbers represent increasing conservatism. These yearly representations of institutional scores are more appropriate for time series data, as they reflect the potential institutional constraints of the yearly political climate.

*Congress median* is Bailey's median ideal point for the legislature. I include this variable in my analyses to examine the special relationship between the legislative body and each individual justice. Epstein and Knight quote Walter Murphy as having written that justices will be willing to moderate their views to avoid extreme reactions from Congress (Epstein and Knight, 2004). My work, however, is one of the first to explore a potential impact on the ideological distance between a justice and his/her appointing president as a result of the preferences of Congress. Consistent with the findings of Model 4.1 (that a Supreme Court justice will drift less as the Congress became more conservative), Hypothesis 5 predicts there will be a negative relationship

between *Congress median* and the dependent variable. In this dataset, *Congress median* has a range of -0.3315 in 1991 to 0.8185 in 1951, and a mean value of 0.032.

To account for theories of intra-Court influence (see: Chapter 3, Model 3.2), I control for the preferences of the other actors on the Court by using Bailey's measurement of the yearly *Supreme Court median*. Wrightsman (2006) and others have theorized that justices influence one another through judicial bargaining. This work, however, is one of the first to explore a potential impact on the ideological distance between a justice and his/her appointing president as a result of the collective preferences. In keeping with previous findings in this work, Hypothesis 6 posits a negative relationship between *Supreme Court median* and the dependent variable. I anticipate that the Court's collective ideological impact on individual justices will be the same as that of the Congress and the president. *Supreme Court median* has a range of -1.365 in 1968 to 0.478 in 1993, and a mean of .0366.

### *Models*

Collectively, all of these variables yield two models: Model 4.2 is a GLS random effect regression model. Model 4.3 is a GLS random effects time series regression model.

$$\begin{aligned} \text{Model 4.2: } Y \text{ (Justice career distance score)} &= x1 \text{ (Appointing president's approval rating)} + x2 \\ &\text{(Segal Cover qualification score)} + x3 \text{ (Held elected office)} + \\ &x4 \text{ (Divided government appointee)} + u \end{aligned}$$

$$\begin{aligned} \text{Model 4.3: } Y \text{ (Justice yearly distance score)} &= x1 \text{ (Appointing president's approval rating)} + x2 \\ &\text{(Segal Cover qualification score)} + x3 \text{ (Held elected office)} + x4 \text{ (Congress median)} + \\ &x5 \text{ (Supreme Court median)} + u \end{aligned}$$

**Table 4.2: Career Supreme Court Justice Distance  
From Presidential Ideology, 1950-2008  
(GLS, Random-Effects Regression)**

Independent Variables	<p align="center">Model 4.2</p> <p align="center">Dependent Variable = <i>Justice Career distance Score</i></p> <p align="center"><i>b</i> (<i>se</i>)</p>
<i>Appointing president's approval rating</i>	<p align="center">.0029 (.012)</p>
<i>Segal/Cover qualification score</i>	<p align="center">-1.278** (.582)</p>
<i>Held elected office</i>	<p align="center">.7929** (.332)</p>
<i>Divided government appointee</i>	<p align="center">.0261 (.286)</p>
Constant	<p align="center">1.549* (.805)</p>
Justices	<p align="center">27</p>
R squared	<p align="center">.347</p>
Variance inflation factor	<p align="center">1.11</p>
Root MSE	<p align="center">.67304</p>

Note: \*p<.10; \*\*p<.05; \*\*\*p<.01 (two-tailed test)

## *Results*

As Table 4.2 displays, the model examining career data shows no statistically significant relationship between presidential approval ratings at the time of appointment, and the absolute value of the distance between a justice's career ideal point and that of his/her appointing president. Hypothesis 1 is rejected, as the results do not support the theory that a president is better able to appoint justices who are ideologically like-minded when his approval ratings are relatively high.

However, this is not the full story. First, there is an observed relationship between *Justice career distance score* and a justice's *Segal/Cover qualification score*. This relationship is significant at the .05 level. The negative coefficient on *Segal/Cover qualification score* reported in Table 4.2 indicates that a highly qualified justice remains closer to his/her appointing president over the course of his/her career than a less qualified justice. Hypothesis 2 is verified. Table 4.2 also shows that justices with elected office experience are more likely to drift than those without such experience. Hypothesis 3 is thus rejected. There data indicate that divided government has no effect on drift. Overall, Table 4.2 shows that a president's approval rating at the time of an appointment to the Court is not related to a justice's career drift in their ideological distance from said president's preferences.

In Table 4.3, I adjust Model 4.2 by making use of yearly panel data and time series regression. But in terms of presidential approval rating, the finding is consistent with the previous model. There is no observed relationship between *Justice yearly distance score* and president approval rating. Thus, just as in Model 4.2, in Model 4.3 we reject Hypothesis 1. Yet Table 4.3 does reveal some results of interest to scholars of judicial behavior.

The relationship between judicial qualification and ideological distance observed in Model 4.2 is present in Model 4.3 as well, this time significant at the .01 level. Again, Hypothesis 2 is verified as we see that justices who are less qualified drift further from their appointing president than those who are better qualified. The similarities among the models continue when we examine Hypothesis 3. As in Model 4.2, I observe that those justices who have previously held an elected position have a greater absolute value distance ideologically from their appointing president than the justices who have never held an elected office. Thus, Hypothesis 3 is rejected in Model 4.3.

It is not surprising that the career ideal points and the yearly measures led to similar results in the two models, at least in terms of my first three hypotheses. However, the unique nature of yearly as opposed to career measurements becomes clear in examination of the institutional control variables. In Model 4.2, there was no significant relationship between divided government appointees and *Justice career distance score*. Yet in Model 4.3 I use a more appropriate measure of institutional constraints on a justice's yearly relationship to his/her appointing president, and the results are quite interesting.

**Table 4.3: Yearly Supreme Court Justice Drift from Presidential Ideology, 1950-2008  
(GLS, Random-Effects Time Series Regression)**

Independent Variables	Model 4.3 Dependent Variable = <i>Justice yearly distance Score</i>  <i>b</i> ( <i>se</i> )
<i>Appointing president's approval rating</i>	.0062 (.010)
<i>Segal/Cover qualification score</i>	-.1.301*** (.505)
<i>Justice held elected office</i>	.8310*** (.283)
<i>Congress median</i>	-.1638*** (.058)
<i>Supreme Court median</i>	.1785*** (.030)
Constant	1.414** (.720)
Justices	27
Total justice terms	449
Rho	.89
Variance inflation factor	4.46
Wald chi-squared	56.34***
Breusch-Pagan LaGrange multiplier, random effects	3615.06***

Note: \*p<.10; \*\*p<.05; \*\*\*p<.01(two-tailed test)

There is a statistically significant relationship between the median yearly ideal point of Congress and *Justice yearly distance score*. The same is true of the relationship between this distance and the yearly *Supreme Court median* as reported by Bailey. Each of these relationships is significant at the .01 level. Yet what is curious about these results is that they go in ideologically opposite directions. Justices decrease their distance from their appointing president as Congress becomes more ideologically conservative, but increase their ideological distance from their appointer as the Court becomes more conservative. Reconciling these seemingly contradictory findings will be the domain of a project subsequent to this.

### *Conclusions*

The findings in this section have broad implications for those interested in the appointment process and/or new institutionalism. While there was no observed link between presidential public approval ratings and the ideological distance between Supreme Court justices and the president who appointed them, I do unearth two variables that are related to this distance. First, the qualification of an individual justice before confirmation is related to ideological distance from the appointing president in a negative direction. In short, justices with a larger degree of ideological disagreement with their appointer were perceived to be less qualified by Segal and Cover. This trend was not unearthed when the more famous Segal and Cover score, that which measures ideology of justices before confirmation, was tested in either model. Further study of the predictive nature of judicial qualifications on judicial voting behavior appears to be in order. Both models show the impact of elected office experience on the ideological distance between

justices and their appointing president. Yet the direction was different than hypothesized. In fact, I find the opposite of what I expected. Justices who have previously won elections are more likely to distance themselves ideologically from their appointing president. This finding has interesting implications for the literature on judicial role orientations, specifically the connection between having previously held elected office and a justice's conception of the proper actions of a Supreme Court justice. Future research may wish to further examine this phenomenon.

While the divided government variable showed no relationship with *Justice career distance score* in Model 4.2, in Model 4.3, the ideal point representation of Congress and the Court have a statistically significant impact on ideological distance. This finding is consistent with the new institutionalism theories suggesting that outside political actors' preferences constrain judicial behavior. The uniqueness of my findings is based on the different ideological direction each institution shifts towards as *Justice yearly distance score* increases. I find that justices are ideologically closer to their appointing president as the Congress becomes more conservative, but that the distance is increased when the Supreme Court as an institution becomes more conservative. Reconciling this particular finding is my next step. The next step in this research will be creating a dependent variable that accounts for directional ideological differences in the "drift" of justices. If the same seemingly contradictory result is still observed from the Congress and the Court in an updated model, further examination of institutional arraignments will be required.

Ultimately, my data fail to show that presidential political capital affects a president's ability to appoint like-minded individuals to the Supreme Court. When presidential approval ratings are used as the measure of a president's political capital no relationship is observed

between ideological differences between justices and their appointing presidents and capital. Other measures of political capital were examined in both models as well, and none suggested a statistically significant relationship between capital and the ideological distance between Supreme Court justices and the presidents who appoint them. Future studies of the effects of presidential approval may show a significant impact on judicial voting behavior, but here I find no evidence of such impact. In sum, the data suggest that presidents of the United States cannot guarantee that the justices they appoint to the Court will display ideologically similar preferences once on the Court by virtue of having high public approval numbers. This finding supports those of Epstein et al. (2007) who suggest that because it is difficult if not impossible for presidents to predict justice voting behavior, presidents would see greater political benefit by using appointments to the Court to satisfy their constituents. Yet my research fails to fully embrace this view. While Epstein et al. (2007) show that presidents cannot be sure how justices will behave on the bench, my findings suggest that in terms of ideological distance from the president, those with increased judicial qualifications will remain tethered more closely to their appointer, while those who previously held office will distance themselves during their tenure on the bench.

### **C. The Impact of Tenure on the Relationship**

Previously in this chapter, I located evidence that presidents succeed in appointing like-minded justices in certain circumstances, and that their success was not related to their approval rating at the time of the appointment. This section is concerned with exploring a third aspect of this complex puzzle: the element of time. In this section, I address the relationship between justice drift and time. My findings illustrate that justices do in fact drift with each additional term served.

I posit that a justice will be more likely to mirror presidential preferences early in his/her career on the Court, but that he/she will gradually evolve into an increasingly independent actor the longer he/she serves. This examination has implications for new institutionalism scholars, as evidence of a diminishing link between judicial and presidential ideology over time provides support for the theory that judicial behavior is responsive to changes in the political environment. While previous research has suggested that the voting of Supreme Court justices will change over time (Segal et al., 2000, Epstein et al., 2005, Epstein et al., 2007), I further this line of inquiry by examining the potential explanations for such variation in judicial voting behavior. Specifically, in Model 4.4 I examine the effects of time on congruity by asking if Supreme Court justices drift further ideologically from their appointing president with each term served on the Court. This research improves upon previous work by controlling for competing explanations of this “drift” consistent with the new institutionalism.

## *Literature Review*

In essence, the theory of the acclimation effect posits that a justice will behave differently during his/her earliest terms on the Court than he/she will in subsequent terms. The theoretical basis of an acclimation effect is that a justice's behavior *changes* in some way, suggesting that a justice's attitudes are *temporarily* unstable (Hagle, 1993, 1145). Timothy Hagle (1993) provided research comparing each justice's conservative voting scores during the acclimation period with his/her voting scores in all other terms. He found that "early" voting differed from "later" voting for 9 of the 13 justices in his study (Hagle, 1993). Wood et al. (1998) find that 13 of 25 justices in their study (1888 -1940) displayed an acclimation effect. However, the statistical methods used in these studies were limited to such a degree that further examination of the acclimation effect phenomenon is warranted.

One major reason that this line of research remains unsettled is that previous scholarship on the acclimation effect has been plagued by a very specific inconsistency; it has failed to identify a distinct period of time as *the* acclimation period (Sharma and Glennon, 2011). For example, some scholars claim that it takes one year for a justice to become acclimated to his/her new role, thus leading to differences in voting behavior between the first year and subsequent years (Brenner and Hagle, 1996, Wood et al., 1998). Still other scholars have set the acclimation period in their studies anywhere from two to five years (Heck and Hall, 1981, Brenner 1983, Hagle 1993). This lack of standardization even among the same scholars in their own different works has led to inconsistent findings (Sharma and Glennon, 2011) or what Wood et al. describe as a mixed bag of results (Wood et. al, 1998, 690).

Hurwitz and Stefko (2004) demonstrate that homage to precedent declines as a justice becomes more experienced and more comfortable in expressing his/her own preferences (Hurwitz and Stefko, 2004). However, their examination breaks units of time into various blocs (years 1-5, years 6-15, etc...). Differencing my research, I make use of a model in which each term is an independent variable. Hurwitz and Stefko (2004) found that “the probability of adhering to precedent falls in a purely monotonic fashion each additional year a justice sits on the bench” (Hurwitz and Stefko, 2004, 126). Yet in this work, instead of solely focusing on adherence to precedent as Hurwitz and Stefko did, I address Supreme Court justice voting behavior in relation to the ideology of their appointing president. I feel this measure of ideological distance allows for better insight into the relationship between newcomer justices and their appointer than focusing on instances where precedent was followed.

Epstein et al. (2007) offer a comprehensive assessment of shifts in justice voting behavior over time, but they focus solely on justices who have served more than 10 terms. Here, I use all the justices for which complete career data is available in the Bailey data. Thus, I account for more justices in this study. In the same vein, Segal et al. (2000) observe a similar shift in agreement between justice ideology and presidential ideology as a justice’s service on the Court continues. They find that “the substantive relationship between presidential policy preferences and justice behavior declines over time” (Segal et al., 2000, 567), yet like Hurwitz and Stefko, they also classify tenure in blocs (1-4 years, 5-10 years, 11-20 years, and 20+ years). These results bolster the notion that time served by justices has an impact on the ideological relationship to their appointing president.

Epstein and Segal (2005) find that during a justice's first four years on the Court his/her voting behavior "correlates at a rather high level (.64) with their appointing president's ideology, but for justices with ten years or more of service, that relationship drops to .49" (Epstein and Segal, 2005, 136). Yet justices are confirmed at many different intervals within a presidential term, thus some justices serve more than four years on the Court while their appointing president is still in office, while some serve less. This section will extend the work of Epstein and Segal by identifying specific yearly changes over the course of a justice's tenure while identifying the terms served for each justice while their appointer remains in office. I then compare their voting behavior during this period to their voting behavior after the president has left office.

This study fits nicely with the literature that favors the new institutionalism approach to judicial politics because I examine shifts in justice behavior relative to the ideology of the appointing president. In short, new institutionalism investigates how courts and individual judges interact with the other branches of government. For a broader review of new institutionalism generally, see: Chapter 2. To date empirical analyses of the post-confirmation relationship between appointing presidents and justice voting behavior are rare. The research that has addressed the topic has focused predominately on the Court's treatment of executive agency power (Schubert 1953, Silverstein and Ginsberg 1987, Yates 1999). Andrew Martin (2006) expands this research by offering evidence of a link between the ideology of the current president and the voting behavior of current justices serving at the same time. Yet this focuses only on the sitting president, and just like Wood et al.'s (1998) and Hagle's (1993) studies of the acclimation effect, this study has methodological problems. Through use of the Bailey ideal

points in this study, I avoid these problems—particularly by placing the ideal points of relevant actors in the same scale.

Timothy Johnson (2003) finds evidence that justices seek information through the solicitor general regarding executive preferences. Perhaps these inquiries flow from concern for implementation and oversight of Court decisions (Johnson 2003). Furthering this idea, Bailey et al. (2005) observe a level of congruity between the Solicitor General's positions and those of Supreme Court justices. Certainly most relevant to this study, Bailey et al. (2005) find that the level of congruity between these positions is highest during the justice's first three terms. Based upon these findings, there is strong theoretical justification to anticipate a close link between the appointing president's ideology and the voting behavior of their newly appointed Supreme Court justices. Ultimately, I expect to discover a significant difference in the level of ideological congruity between Supreme Court justices and their appointing president over time. Next, I present a model which aims to establish the link between judicial agreements with their appointing president's ideology where the number of terms served is the main explanatory source of any change to that level of congruity.

### *Data Sources and Hypothesis*

To examine the question of judicial congruity, I use a panel dataset that addresses the matter of ideological drift by Supreme Court justices while controlling for potential limitations on a president's ability to choose an ideologically compatible Supreme Court justice. Model 4.4

makes the necessary adjustments to examine congruity over time. Again, in this model I make use of the Michael Bailey ideal points.

### *Dependent variable*

My dependent variable is *Justice yearly distance score* for each justice in the dataset. This variable captures the yearly distance between a justice's voting score and his/her appointing president's ideal point. To allow direct comparison with Epstein et al. (2007), I include only those justices for whom complete career data is available. But, I do not limit the model to only those who served more than 10 terms. This produces a model that examines the voting behavior of 23 justices over 417 terms. As with the other models in this dissertation, the actor's Bailey scores are used to create the dependent variable. In Model 4.4, *Justice yearly distance score* represents the absolute value difference between a justice's yearly Bailey score and the appointing president's Bailey score. The mean for *Justice yearly distance score* is .760, with a range of 0 - 2.13.

### *Independent variables*

The most important independent variable in this model is *Terms served by justice*. This primary independent variable improves upon previous works by avoiding the categorical time blocs (terms 1-5, 6-10, etc.) described earlier. Based on previous findings discussed (Segal et al., 2000, Hurwitz and Stefko, 2004), Hypothesis 1 predicts that *Justice yearly distance score* will increase

with each additional term that a justice serves on the Court. In short, I expect that for every additional year served on the bench a Supreme Court justice will drift further away from the ideal point of his/her appointing president. This variable ranges from 1 to 36. The yearly representation is recorded for each justice for each year for which complete career data is available.

In Model 4.4, I use five control variables. The first of these is *Appointing president's approval rating*. This is the same variable I used in Models 3.3, 4.2, and 4.3. As a reminder, this score represents the Gallup Approval Rating for the appointing president at the closest day available preceding a justice's confirmation vote in the Senate. It is included in this model because, as Eisgruber points out, "A powerful and popular president may be able to push through his preferred candidate without regard to what opposition senators think" (Eisgruber, 2007, 15). While previous examinations reveal no significant relationship, this remains a relevant variable in a career examination of drift. The mean for this variable is 59.5, and the range is 38 - 84.5.

Next, I consider *Appointing president's distance to filibuster pivot*. This score measures the distance between the appointing president's Bailey ideal point and the Bailey ideal point of the Senator holding the unique position of filibuster pivot at the time of the confirmation vote. This is the variable created by Dr. Hemant Sharma that was discussed above. After the yearly scores of all senators are ranked, the potential cloture vote for ending a filibuster is located. As a reminder, in cases prior to 1975, this "filibuster pivot" resides at the 67<sup>th</sup> (or 33<sup>rd</sup>) percentile, while after 1975, when the standard was changed by an act of Congress, the 60<sup>th</sup> (or 40<sup>th</sup>) percentile is located. For lengthier discussion of this variable consult the description in Chapter 3. The Bailey ideal point score of that pivotal senator is subtracted from the president's

bailey ideal point score and the absolute value of the difference serves as our *President's distance to filibuster pivot*. The mean for this variable is 1.03, with a range of .128 - 2.02.

I also consider the impact of a justice's previous experience via *Previous years as federal judge*. This measure is the same one I used in Models 3.3 and 4.1. This variable reports the number of years a nominee served as a federal judge before he/she was confirmed to the Supreme Court. Theoretically, this previous servitude may matter, as Baum explains, "a prior judicial record helps presidents and their advisers to predict the positions that prospective nominees might take as justices" (Baum, 2007, 60). Thus, I assume that the presence of a previous ideological footprint may provide presidents with information used in the judicial selection process. The mean for this variable is 3.43 and the range is 0 - 15.

Model 4.4 also features two variables that account for changing political conditions in the legislative and executive branches. The first is called *Congressional drift*. This variable accounts for the absolute value of the difference between the median yearly ideology score for Congress the year that a justice is confirmed and the median yearly ideology score for the Congress. This variable accounts for a justice that potentially reflects ideological drift in line with congressional conditions. This variable may also account for a justice behaving in line with broader trends in politics that impact congressional ideology (Mishler and Sheehan 1996, McGuire and Stimson, 2004). In Model 4.4, the mean for this variable is .235 and the range is 0 - .761.

The second institutional control variable is *Presidential drift*. This variable is the absolute value of the difference between the appointing president's Bailey ideology score and the sitting president's Bailey ideology score at the time a Supreme Court decision is made. This variable

enables me to distinguish a justice who actually conforms to the ideology of any sitting president, as Martin (2006) found, from a justice who aligns ideologically with his/her appointing president. In Model 4.4, the mean for this variable is .882, and the range is 0 - 2.52.

### *Model*

Collectively, these variables lead to the following GLS random effects time series regression model:

#### Model 4.4:

$$Y \text{ (Justice yearly distance score)} = x1 \text{ (Terms served by justice)} + x2 \text{ (Appointing president's approval rating)} + x3 \text{ (Appointing president's distance to filibuster pivot)} + x4 \text{ (Years served as federal judge)} + x5 \text{ (Congressional drift)} + x6 \text{ (Presidential drift)} + u$$

### *Results*

Table 4.4 offers strong support for Hypothesis 1. In Model 4.4, it is observed that with each additional term served on the Supreme Court, *Justice yearly distance score* increases. This finding suggests that a justice's voting score drifts further from his or her appointing president's ideology score over time, even after controlling for other variables. Interestingly, none of the control variables in the model are statistically significant. The implication of this finding is that tenure on the court is the greatest predictor of increased ideological difference between presidents and the Supreme Court justices that they appoint.

**Table 4.4: The Impact of Tenure on Yearly Supreme Court Justice Drift from Presidential Ideology, 1950-2008**

**(GLS, Random-Effects Time Series Regression)**

Independent Variables	Model 4.4 Dependent Variable = <i>Justice Yearly Distance Score</i>
<i>Terms served by justice</i>	.0158*** (.001)
<i>Appointing president's approval rating</i>	.0043 (.002)
<i>Appointing president's distance to filibuster pivot</i>	.0060 (.212)
<i>Years served as federal judge</i>	-.0198 (.022)
<i>Congressional drift</i>	-.0091 (.071)
<i>Presidential drift</i>	-.0045 (.012)
Constant	.3283 (.669)
Justices	23
Total justice terms	417
Rho	.88
Variance inflation factor	3.99
Wald chi-squared	145.36***
Breusch-Pagan LaGrange multiplier, random effects	3923.67***

Note: \*p<.10; \*\*p<.05, \*\*\*p<.01 (two-tailed test)

This finding suggests that the longer a justice serves on the Court, the more he or she begins to act independently of the preferences of his/her appointer. This is consistent with Hurwitz and Stefko's (2004) finding that, "From the justice's first year onward, a precipitous descent in the probability of precedent conformance for succeeding years is readily apparent" (Hurwitz and Stefko, 2004, 126). This finding builds upon their conclusion by showing that justices, over time, abandon the initial ideological allegiance they hold towards their appointing president. In short, Supreme Court justices display an increased independence from the preferences of their appointer over time. Additionally, these findings confirm the work of Segal et al. (2000) and Epstein and Segal (2005), who describe justices who will drift from the ideology of an appointing president after certain blocs of time. Yet, this work does so making use of the Bailey ideal point measures which are indicators of preference that place ideology scores of actors in the same scale.

### *Conclusions*

This section of this dissertation aims to address previous inconsistencies in the acclimation effect literature by examining the degree to which justices conform to the ideology of an appointing president at different moments in their tenure. In Chapter 3, I reported a high level of congruity between presidents' Bailey ideal point scores and career *Justice ideal point* scores for their Supreme Court appointments. This study expands on that finding by examining the degree to which justices distance themselves from the preferences of their appointing president with each additional term served. Taking this approach allows me to account for the theories prevalent in

acclimation studies while remaining aligned with the theory of new institutionalism. In summary, the coefficient on *Terms served by justice* in Model 4.4 indicates that Supreme Court justices will drift further from their appointing president's ideology with each additional term served. In other words, a justice is more likely to vote in alignment with the ideology of their appointing president earlier in their tenure on the Court than later. This finding holds when I control for other factors that might affect judicial voting scores. My findings are relevant to scholars interested in the ability of appointing presidents to see their ideology appear in the voting behavior of their Court appointments. In addition, I describe a process in which justices advance toward increased independence with each term served on the Court. Consistent with the other findings in this dissertation, the results here highlight the need for judicial scholars to account for the relevant contributions from each approach to develop a more inclusive theory that accounts for link between the voting behavior of Supreme Court justices and the presidents who appoint them.

**Table 4.5: Ideology of Justices and Appointing Presidents; Bailey Scores, 1950-2008**  
(Listed in Descending Order of Congruity)

Justice	<i>Bailey Career Average Score</i>	Appointing President	Appointing President's Bailey Score	Absolute Value Distance
Thomas	1.13	Bush I	1.11	0.020
Burger	0.775	Nixon	0.835	0.060
Ginsburg	-0.815	Clinton	-0.877	0.062
Stewart	-0.118	Eisenhower	-0.049	0.069
Scalia	0.954	Reagan	1.15	0.196
Breyer	-0.616	Clinton	-0.877	0.261
Alito	0.84	Bush II	1.11	0.270
Rehnquist	1.11	Nixon	0.835	0.275
Goldberg	-1.69	Kennedy	-1.37	0.320
Roberts	0.79	Bush II	1.11	0.320
Whittaker	0.28	Eisenhower	-0.049	0.329
Harlan	0.286	Eisenhower	-0.049	0.335
Powell	0.309	Nixon	0.835	0.526
Fortas	-1.61	Johnson	-1.05	0.560
Marshall	-1.618	Johnson	-1.05	0.568
Kennedy	0.407	Reagan	1.15	0.743
O'Connor	0.382	Reagan	1.15	0.768
Blackmun	-0.28	Nixon	0.835	1.115
Warren	-1.198	Eisenhower	-0.049	1.149
Brennan	-1.394	Eisenhower	-0.049	1.345
White	0.117	Kennedy	-1.37	1.487
Stevens	-0.894	Ford	0.781	1.675
Souter	-0.638	Bush I	1.11	1.748



## **V. Presidential Quality and Judicial Quality**

Previous sections of this dissertation have examined the impact of presidential ideology on the voting behavior of Supreme Court justices. Next, here in Chapter 5, I provide a unique study of the relationship between presidents and Supreme Court justices by examining a potential link between presidential quality and judicial quality.

In short, I ask: Historically, do the “great” presidents appoint “great” Supreme Court justices? Scholars of the presidency have long embraced the notion that presidents not only could, but should, be ranked in terms of historical greatness. Despite the inherent subjectivity of such rankings, compiling a significant number of rankings where consistent parameters are established allows consensus to emerge. Absent in the literature on Supreme Court justices is the same sort of consensus. Abraham (2008) draws attention to studies that began the process by categorizing justices, and other scholars have begun to rank various subsets of justices (the various “courts,” i.e. “the Warren court”) based on their historical impact. Building upon that foundation, this work will rank the justices 1-108. Through scaling techniques, I then present a model that seeks to determine whether historically “great” presidents appoint “great” justices. This research provides a new inspection of the relationship between the executive branch and the Supreme Court, and thus will add to the body of literature concerning new institutionalism perspectives on the Court.

I approach this question by first examining unique sources of rankings of presidential quality and comparing these with the quality ranking of Supreme Court justices. As mentioned previously, scholars of the presidency have long embraced the notion that presidents can be ranked. More recently, scholars of the Supreme Court have ranked justices. Ultimately, in this chapter I will explore the relationship between presidential quality and justice quality.

## **The Link Between Presidential Greatness and Judicial Quality**

My research reflects the assumption that there is a relationship beyond simply that of appointer and appointee between each Supreme Court justice and the president who appoints him/her. Much of the research in this area, including the preceding chapter of this work, focuses on the ideological relationship between justices and presidents. Early assessments suggested that presidents were successful in seeing like-minded individuals confirmed to the Court (see, among others: Dahl 1957). Segal et al. (2000) determined that presidential preferences, as measured by a “Survey of Presidential Experts,” provided strong indicators of justices’ career voting behavior. These basic propositions have been verified in the preceding chapters of this work. Yet, these findings highlight an ideological connection between the two actors. This work aims to extend this line of research by incorporating considerations of quality as a component of the presidential-judicial relationship.

### *Theoretical Developments in the Ranking of United States Presidents*

Numerous academic and journalistic outlets have participated in a process to achieve consensus as to who were the “best” presidents during the last 50 years. Interestingly, while there are many presidents that have improved or declined in their historical position as scholars have reevaluated their performances in later eras, the top and bottom of these lists have remained remarkably stable.

The first widely reviewed ranking of United States presidents was conducted by Arthur Schlesinger for *Life* magazine in 1948. He would conduct similar polls again in later years (Abraham, 2008, 345). Each time Abraham Lincoln was “voted” the top chief executive. The

results reflected the aggregate feedback that Schlesinger received from surveys of scholars knowledgeable in the area of presidential achievement. These early studies were quick to spawn imitators. But the value or usefulness of these rankings has always been nebulous. Is there substance to presidential rankings as many presidential scholars suggest? Or, as critics of this approach imply, do they simply provide an easy to comprehend list of presidential quality that Americans desire?

Max Skidmore suggests the popularity of presidential rankings is based in the American desire to settle debates of such nature. He also points out that although the various top 10 and worst 10 presidents have stayed remarkably constant over time, there is substantial fluidity in rankings in between (Skidmore, 2004). Thus, Skidmore is not convinced that there is validity in presidential rankings, citing the obvious political biases involved for respondents, but also the impossible task of ranking presidents who served particularly short terms in office or those who experienced levels of both obvious achievement and failure, such as Wilson and Nixon (Skidmore, 2004, 4). In *Presidential Performance*, Skidmore attempts to describe in great detail the presidencies of each who has served in that capacity, evaluating each individually, not necessarily relative to one another.

Ultimately, Skidmore criticizes many presidential ranking systems, saying that each president can only be rated in the context of his time in office, a variable that is beyond his control. This is of course true; some presidents are never given the opportunity to show either greatness or failure. Yet this critique speaks to the subjectivity inherent in both qualitative and quantitative approaches to examining presidential quality, not just to a shortcoming in the quality of presidential ranking list.

While there is some theoretical validity in many of Skidmore's assessments of presidential rankings, many of his concerns have been addressed by contemporary studies. To highlight a couple, most studies now exclude presidents like Harrison that served very brief tenures. Additionally, many modern rankings that make use of improved techniques in survey selection have helped eliminate some potential political biases. In short, the process of polling has improved in terms of providing greater objectivity and greater participation from the presidential rankers.

The main dilemma in ranking presidents in terms of quality derives in determining which criteria to consider when asking what presidential attributes reflect presidential greatness. In perhaps one of the most famous sets of presidential rankings, Ridings and McIver (1997) are able to directly address this concern by asking those that responded to the survey to weigh the importance of the criteria presented. While many other presidential greatness surveys provide no direction, and some provide a criteria list that is so numerous it become repetitive, Ridings and McIver ask those evaluating presidents to consider the relative importance of five main categories: leadership qualities, accomplishments and crisis management, political skill, appointments, and character and integrity (Ridings and McIver, 1997, 8). Additionally, the authors significantly increased the sample size of respondents from the Schlesinger studies, while accounting for the notion that presidential opportunity is not always the same.

The scholar that has studied presidential rankings perhaps more than any other is Dean Keith Simonton. Through numerous avenues of research, Simonton argues that there is substantial value in presidential rankings. He extends this line of research with multiple studies of the art of becoming a highly ranked president, thus examining the process of ranking

presidents itself. The result of this effort is the “standard model of greatness” (Cohen, 2003, 921). Simonton suggests that presidential greatness as perceived by scholars is tied to the following presidential traits or accomplishments: the number of years in office, the number of years as a wartime commander-in-chief, administrative scandal, assassination, and having entered office as a national war hero (Simonton, 1986, 259). He would later add intelligence to this list of personal attributes that can help increase a president’s ranking (Cohen, 2003, 915). Simonton’s work into the study of presidential greatness has been successfully replicated numerous times, and provides insight into the process of how scholars value certain presidential achievements while disregarding others.

While the criteria used for ranking presidents have varied, the results typically have not. For this study, I examined 15 unique presidential ranking lists. In 14 of those 15 reports, the top three presidents consisted of Washington, Lincoln, and FDR in some order. Ultimately, I opted not to include each of these rankings in this study due to inconsistencies in some of the approaches and in the number of presidents evaluated. In this research, I make use of eight unique measures of presidential quality, as detailed in the discussion of the data that follows.

### *Theoretical Developments in the Ranking of Supreme Court Justices*

Rating Supreme Court justices is newer by comparison to the rating of presidents. Given the attention provided each institution in political discourse and popular culture, this is hardly a surprising revelation. Just as with attempts to quantify presidential rankings, one of the main challenges facing scholars in attempting to rank the justices is identifying the criteria to be used in forming the judgments. Additionally, there are a far greater number of justices than presidents,

and many more historically obscure ones. Previously, this ambiguity has led to incomplete examinations of only selected justices or Court “eras.” This less comprehensive approach is partially responsible for the failure of previous work to examine the relationship between the quality of presidents and justices.

While there were previous attempts to list “great” justices made, Abraham and others suggest that the first comprehensive attempt to rank all the Supreme Court justices was carried out in 1970 by Blaustein and Mersky (Abraham, 2008, 341). *The First One Hundred Justices* reports the result of a survey of law school deans and professors of law, history, and politics. The survey asked respondents to evaluate justices starting with John Jay through the appointment of Thurgood Marshall. The Supreme Court justices were determined to be in one of five categories: “Great”, “Near Great”, “Average”, “Below Average”, and “Failure.” These findings are further discussed in the data section of this work. Like the Schlesinger poll of presidential greatness, this survey captured the attention of many who followed the Court, leading to numerous articles about the ten best justices.

In 1993, Robert Bradley presented a list of great justices in “Who Are the Great Justices and What Criteria did They Meet?” Bradley’s list featured John Marshall, Holmes, Warren, Brandeis, and Brennan as the top 5 justices. Bradley took the approach of classifying the evaluators by their professional identities, for example: judges, attorneys, and students. Interestingly, the results were fairly consistent across all groups. Elsewhere, Bernard Schwartz’s *A Book of Legal List: The Best and Worst in American Law* aims to identify the ten best and ten worst justices of all time. Yet again, the findings “closely [conform] to the general view of the

other rankers” (Abraham, 2008, 343). This consistency of rankings parallels what is observed in descriptions of the various presidential surveys.

Michael Comiskey’s (2004) work offers a more complex system of ranking. Still based on survey data, Comiskey sought to determine the effect that increasingly hostile confirmation battles were having on the perception of justice quality. He does so by examining the rankings of more modern justices compared to those who served early in the 20<sup>th</sup> century. Comiskey (2004) finds that judges who served before 1967 are, on average, ranked lower in survey responses of judicial quality and that post-1967 appointments are consistently ranked higher. In short, Comiskey suggests that methodologically comparing justices against the mean ranking of their era is the best way to determine their overall value (Comiskey, 2004, 90). These comparisons form the basis for his ranking system described in the data section of this work.

Pederson and Provizer (2003) provide a comprehensive overview of the topic in *Leaders of the Pack, Polls and Case Studies of Great Supreme Court Justices*. This book includes summary articles of many of the previous studies focused on judicial rankings (including the Bradley chapter referenced earlier) and focuses primarily on the leadership qualities that led to the greatness of 16 justices from Marshall to O’Conner. In addressing the main problems with this line of research, Pederson and Provizer suggest that leadership and greatness on the Court are contained in the following ideas: clarity in writing in terms of establishing reasoned guidelines for lower courts, consistency of principles with a willingness to reevaluate the past, initiative in shaping public opinion, the ability to build consensus on the court, specific assistance to the legal profession, and the lasting impact of the principles espoused (Pederson and Provizer, 2003, 10).

Overall, reviewing the judicial rankings literature I find there are both similarities and differences compared to works concerned with presidential greatness. While both kinds of studies have achieved a similar level of consistency, there is a much sharper divide on which criteria and methods are best used to evaluate Supreme Court justices. However, the constitutionally differing nature of the positions might suggest as much. While presidents will always be valued for their various leadership abilities, scholars may examine any number of traits from a justice to measure his or her success on the bench.

Here, both presidential rankings and the rankings of Supreme Court justices are considered in a comprehensive study to determine the nature of a relationship between the two. Although each set of rankings has its shortcomings, the lack of standardized criteria before evaluators has had little impact of the overall rankings of presidents or Supreme Court justices. Almost stunningly, there is a remarkable amount of similarity in the rankings of the presidents and justices. Here, I use multiple studies of both presidential and justice quality to create two overarching measures.

#### *Data Sources; Ranking the Presidents*

In this section, I will describe the data I used in this chapter. First, I create a measure called *Presidential rank*. This is a composite score formulated by averaging the scores of eight measures of presidential effectiveness. The presidents are ranked 1-41 and listed in Table 5.7.

Forty of the presidents are included in all eight measures I use in the project. The 2005 *Wall Street Journal* survey does not offer a ranking for William Harrison or James Garfield, and George W. Bush and Barrack Obama are not included in those surveys that were conducted

before their tenure in office had begun. Because their tenures were too recent for proper historical reflections and there has been little time for their appointed justices to make a career contribution, President George W. Bush and President Obama are ultimately excluded from this study despite their presence in the initial analysis conducted for this work.

William J. Ridings, Jr. and Stuart B. McIver's (1997) book *Rating the Presidents: A Ranking of U.S. leaders, from the Great and Honorable to the Dishonest and Incompetent* provides the results for our first set of scores. Specifically, I make use of two of their presidential ranking variables, their "overall" ranking, and their ranking based on strength of "appointment." Ridings and McIver polled many political scientists, historians and politicians from each state and asked them to consider five categories (leadership qualities, accomplishments and crisis management, political skill, appointments, character and integrity); the results were tabulated to create the overall ranking.

Second, I considered the results of *The Wall Street Journal* 2005 poll conducted by James Lindgren of Northwestern University. In 2000, *The Wall Street Journal* conducted a study that aimed for ideological balance of those surveyed to correct for perceived failures of previous studies to do so. This study announces itself as the results of the polling of an "ideologically balanced group of 132 prominent professors of history, law, and political science." The 2005 edition overseen by Lindgren continued in this methodological tradition but provides a more recent data point.

Next, I consider a *Rasmussen Reports* poll taken in June of 2007 that asked 1,000 randomly-selected adults to rate American presidents in terms of their overall favorability. The presidents are then ranked in order of those that received the highest favorability rating to the

lowest. For example, top-ranked George Washington was 94 percent favorable and only two percent unfavorable, while #20 Bill Clinton was 55 percent favorable and 41 percent unfavorable. This poll provides a standard, citizen-based preference element of presidential performance.

The 2009 CSPAN survey of presidential leadership was conducted by 64 presidential historians and longtime observers of the presidency. The Presidents were ranked in 10 categories of presidential leadership characteristics and ranked accordingly due to the composite findings in these 10 categories: public persuasion, crisis leadership, economic management, moral authority, international relations, administrative skills, relations with congress, setting an agenda, pursued equal justice for all, performance within the context of the times. This survey provides a very recent data point and also nicely displays the criteria used in making the determination of presidential quality.

Finally, I make use of the 2010 Sienna College poll of presidential scholars. This survey was the 5<sup>th</sup> of its type since 1982 conducted by the Siena College Research Institute. This survey of scholars asks respondents to rank Presidents in 20 different categories of presidential ability. I will make use of 3 of these measures in this research: leadership ability, court appointments, and overall ability.

#### *Data Sources; Ranking the Justices*

The ranking of the Supreme Court justices is based on an original data set created for this research. Similar to the process of creating *Presidential rank*, I combine several previous efforts at ranking judges and then consider several additional factors that ultimately yields a ranking of

the justices 1- 108. This variable is then called *Justice rank*. This method remains within the parameters for ranking justices established in *The First One Hundred and Eight Justices* (Bader and Mersky, 2004), and is consistent with the principles for ranking justices as described by Pederson and Provizer (2003) and Abraham (2008). *Justice rank* is determined averaging all rankings for which the justice scored from those described in the following section, and then ranking them 1-108 where lowest average score represents the top justice. With an average tally of 4.88, Hugo Black is the top justice in the data set, while Thomas Johnson is ranked 108 based on his average score of 99.83. To formulate *Justice rank*, I rely on several sources that I will now describe.

First, I use *The First One Hundred Justices*, which contains a survey of 65 law school deans and professors of law, history and politics. In 1970, this project was conducted by Blaustein and Mersky to evaluate all the justices who served from 1789 through the appointment of Thurgood Marshall. Contrary to the book's title, this evaluation rated 96 Supreme Court justices into five categories: "Great," "Near Great," "Average," "Below Average," and "Failure." The respondents felt there were 12 "great" justices, 15 "Near Great" justices, 55 "Average" justices, 6 "Below Average" justices, and 8 that were said to be "Failures." *The First One Hundred and Eight Justices* (Bader and Mersky, 2004) continued in the tradition of this survey by updating the rankings to include the justices that served from Thurgood Marshall to justice Breyer.

Next, I consider the list of judicial quality as reported by Michael Comiskey in his 2004 book *Seeking Justices: The Judging of Supreme Court Nominees*. Comiskey ranks the 52 justices that served from Holmes to Breyer using a survey taken in 2000 of 128 professors of law or

political science. The survey asked respondents to rate the justices appointed in the twentieth century as excellent, good, fair, poor, or failure (Comiskey, 2004, 88). Respondents rated justices on the quality of their legal reasoning, their ability to communicate their decisions clearly, and their leadership on the Court. Comiskey's survey determined that Louis Brandies was the top adjudicator, Potter Stewart the median justice of the twentieth century, and Charles Whittaker ranked the lowest.

Additionally, I incorporate the ranking of all Supreme Court justice from John Jay to Anthony Kennedy as presented by Epstein et al. (1992). This list of judicial greatness was compiled through a comparison with the all-time leaders in certain statistical categories from the National Basketball Association. Noting some similarities between the two "courts," the authors highlight ten measures of performance that indicate greatness in each field. They ranked the judges (players) in the following categories (basketball corollaries are noted in parentheses):

- Case Decided (Games Played)
- Total Opinions Written (Points Scored)
- Majority Opinions Written (Field Goals Made)
- Majority Opinions Written in Significant Cases (Three Point Shots Made)
- Signed Majority Opinion in Significant Cases (Assists)
- Concurrence Blocking Majority Opinions Formation (Blocked Shots)
- Voting with Majority to Overrule Precedent (Steals)
- Dissenting Votes in Cases Later Overturned (Rebounds)
- Books, Articles Written About Justices (All NBA First or Second Team)

The authors then developed a composite score based on all of these categories, and ranked the justices from 1-104. Epstein et al. (1992) determined that the top justice was William O.

Douglas, that the median justices were Noah Swayne and Joseph Story, and that the lowest rated justice was Alfred Moore.

Finally, I consider the length of tenure on the Court as an important measure of relevance to the impact of a Supreme Court justice. Although certainly this factor is considered in the ranking of justices in the surveys and analysis done previously, explicitly or otherwise, it is of particular importance when addressing the role of each Supreme Court justice in the research question of this specific work. Presidential impact on the Court cannot have a lasting impact when justices serve very short tenures. Conversely, justices who serve the longest tenures represent the presidential legacy of their appointers in a larger number of cases. I measured this variable by ranking the justices 1-108 in terms of tenure length. When there were an equal number of years served, the actual resignation date was used to determine which justice served the longer number of days. William O. Douglas served the longest tenure on the Court, the median tenure belongs to Stephen Breyer, and the shortest time on the high Court was served by Thomas Johnson. Of course, it should be noted that this variable remains fluid for the justices currently serving on the Court, and thus their historical ranking will improve the longer they remain on the Court.

These four measures were then weighed equally in determining the overall quality of the justices from John Jay to Breyer. This variable is called *Justice Rank*. The appointments of George W. Bush (Roberts and Alito) and Barack Obama (Sotomayor and Kagan) were originally factored into the data analysis for this project, but ultimately are excluded in Tables 5.1-5.5 presented below, as there is currently some lack of consensus opinion about their performance. Further, the first 57 justices that served were not factored into Comiskey's score, so those justices' values reflect their average ranking on the other three scores. Justices Blackmun through Breyer are present in every other study used herein, but are not rated in *The First One*

*Hundred Justices*, while the Epstein et al. (1992) scores do not account for Justices Souter, Thomas, Ginsburg and Breyer. The justices are ultimately ranked 1-108 in terms of overall quality on the Court as presented in Table 5.8.

The rank order of presidents and Supreme Court justices to create *Presidential rank* and *Justice rank* are the two most important variables in this study. Yet several others will serve as control variables in my model. Another variable considered will be *Appointing president number of appointments*, to control for the number of appointments that presidents have made as a potential impact on justice quality. I also account for the theory that the chief justices of the court have been historically more highly regarded. This dichotomous variable, *Justice served as Chief* is coded “1” if a justice has ever served as chief, “0” if they have not. Twelve of the 108 justices in this study served as chief, only 11.11 percent.

Finally, I control for judicial ideology by testing the relationship between judicial quality and a justice’s party allegiance. This variable is derived from the “justice nominal party allegiance at appointment” measure as reported by Abraham (2008) that assigns a political party to each justice prior to their appointment. In this study, there are 43 justices that are Republican, 43 that are Democrat, 13 Federalist, 7 Democratic-Republicans, 1 Whig (Benjamin Curtis ) and 1 independent (Felix Frankfurter) (Abraham, 2008, 349-353). I measure this effect in my model with the variable *Republican justice*, a dichotomous variable coded “1” for justices who were aligned with Republican Party at time of appointment, and “0” for all others. While this measurement does not account for ideological differences between presidents and justices, or even over time, it does account for the party affiliations of justices at the time of appointment.

The notion that party allegiance could affect judicial quality is controlled for through this variable.

These variables are considered to test the following hypotheses:

**H<sub>1</sub>**- *As the overall rank of a president improves, so too will the overall average quality rank of the justices he appointed to the Supreme Court.*

**H<sub>2</sub>**- *As the total number of appointments to the Court a president has made increases, so too will the average overall rank of that Supreme Court justices he has appointed.*

**H<sub>3</sub>**- *As the overall rank of a Supreme Court justice improves, so too will the likelihood of that justice having served as chief justice of the Court.*

### *Findings*

With the ranking of the presidents and Supreme Court justices complete, we now turn to examining a possible relationship between the two in terms of quality. I start by asking which presidents had appointed the best justices based on the justices' overall rank. The average justice rank is the average overall quality scores for each of the justices that an individual president appointed to the Supreme Court. The initial findings are seen in Table 5.1. The entire list is available in Table 5.9.

Table 5.1: Most Effective Presidents as Ranked by Average Quality Rank of Appointments

Appointer Rank	President	Average Justice Rank	# of Appointments
1	Ford, Gerald	6	1
2	Coolidge, Calvin	13	1
3	Nixon, Richard	16.25	4
4	Reagan, Ronald	25	3
5	McKinley, William	33	1

Table 5.1 displays several findings that might lead one to question the methods used in determining the appointer rank. Quick examination shows that three of the top five presidents listed made only one appointment to the Court. To their credit, Ford’s appointment of John Paul Stevens, Coolidge’s selection of Harlan Stone, and McKinley’s pick of Joseph McKenna were all relatively successful picks in terms of this ranking process. Yet theoretically, it is difficult to argue that a president who made only one appointment has impacted the Court as much as presidents who made multiple selections. Interestingly, the bottom of the presidential rankings feature similar situations where presidents who were less successful overall also only selected one justice.

Table 5.2: Least Effective Presidents as Ranked by Average Quality Rank of Appointments

Appointer Rank	President	Average Justice Rank	# of Appointments
31	Fillmore, Millard	74	1
32	Polk, James K	77	2
33	Van Buren, Martin	77	2
34	Garfield, James	80	1
35	Pierce, Franklin	91	1
36	Washington, George	94.2	10
37	Adams, John Q	107	1

Table 5.2 reveals a similar story of the six least effective presidents in this study. Remember that George W. Bush and Barrack Obama have been excluded from this study, and four presidents served without the chance to make an appointment to the Supreme Court: Jimmy Carter, William Harrison, Zachery Taylor, and Andrew Johnson. Clearly, presidents who made only one appointment to the Court appear to have been either extremely successful or not at all so. In fact, only #18 James Buchanan and #20 Zachery Tyler are ranked between six and 29 in terms of overall quality justice average. In short, the small sample of presidents who only selected one

member of the Court has them over-represented at the margins of the rankings when all presidents are accounted for. In an attempt to control for the extremities of effectiveness displayed by solo appointers, I next re-calculate the effectiveness of presidents who made at least two appointments to the Court.

Table 5.3: Effective Presidents who made a Minimum of 2 Appointments, as Ranked by Average Quality Rank of Supreme Court Appointments

Appointer Rank	President	Average Justice Rank	# of Appointments
1	Nixon, Richard	16.25	4
2	Reagan, Ronald	25	3
3	Eisenhower, Dwight	33.6	5
4	Clinton, Bill	34	2
5	Roosevelt, Franklin	37.25	8
6	Bush, GHW	40.5	2
7	Madison, James	42.5	2
8	Hoover, Herbert	42.5	2
9	Johnson, LB	44	2
10	Roosevelt, Teddy	44.67	3
11	Lincoln, Abe	45.8	5
12	Kennedy, John F	47.5	2
13	Wilson, Woodrow	48	3
14	Hayes, Rutherford B	51	2
15	Harding, Warren	51.5	4
16	Cleveland, Grover	53	4
17	Grant, Ulysses	55	4
18	Arthur, Chester A	55.5	2
19	Adams, John	58	3
20	Jackson, Andrew	58.5	6
21	Taft, William H	61	5
22	Jefferson, Thomas	66	3
23	Harrison, Benjamin	71.25	4
24	Truman, Harry	72	4
25	Polk, James K	77	2
26	Van Buren, Martin	77	2
27	Washington, George	94.2	10

Table 5.3 eliminates the presidents who only made one appointment to the Supreme Court and provides a look at which presidents made more of a lasting impact on the Court. In all,

27 of the 41 presidents in this study made at least two appointments. Richard Nixon, who ranks comparatively low in the overall presidential rankings, claims the top spot here. Nixon appointed four justices, each of which rank in the top 25 percent of justices in overall quality. Nixon appointed Warren Burger (26), Harry Blackmun (10), Lewis Powell (22), and William Rehnquist (7). Interestingly, George Washington, the top ranked president overall, finishes last by a rather wide margin. This ranking of course is more a reflection of the Court's stature at the beginning of the new nation than of the men who Washington appointed, as well as the short tenure the men of the early Court served. This idea is discussed further later in this work.

To extend this line of thinking, I next examine the presidents who appointed three or more justices to the Court. There are 17 chief executives who fit this description. Washington of course had the largest number of appointments with 10, as he needed to fill an empty institution. Franklin Delano Roosevelt is next with eight, which is not surprising as he served the longest of any president predating the 22nd Amendment. Table 5.4 displays the rank order of effectiveness of presidents who made three or more appointments.

Immediately upon investigating Table 5.4, it becomes clear that the variation of the party of the presidents is more one-sided than one might have expected. Of the 17 presidents in Table 5.4, nine were Republicans, including the top three and five of the top six, compared to only five Democrats. Obviously, the meaning of party labels has not been consistent in United States history, and Andrew Jackson was certainly not an ideological twin with Harry Truman. But this finding leads to further questions for exploration. Is this just a matter of fortuitous timing for the Republicans on this list, or are some other political phenomena at play?

Table 5.4: Effective Presidents who made a Minimum of 3 Appointments, as Ranked by Average Quality Rank of Supreme Court Appointments

Appointer Rank	President	Average Justice Rank	# of Appointments	Party
1	Nixon, Richard	16.25	4	Republican
2	Reagan, Ronald	25	3	Republican
3	Eisenhower, Dwight	33.6	5	Republican
4	Roosevelt, Franklin	37.25	8	Democrat
5	Roosevelt, Teddy	44.67	3	Republican
6	Lincoln, Abe	45.8	5	Republican
7	Wilson, Woodrow	48	3	Democrat
8	Harding, Warren	51.5	4	Republican
9	Cleveland, Grover	53	4	Democrat
10	Grant, Ulysses	55	4	Republican
11	Adams, John	58	3	Federalist
12	Jackson, Andrew	58.5	6	Democrat
13	Taft, William H	61	5	Republican
14	Jefferson, Thomas	66	3	Dem- Republican
15	Harrison, Benjamin	71.25	4	Republican
16	Truman, Harry	72	4	Democrat
17	Washington, George	94.2	10	Federalist

Empirically, these findings offer a mixed bag of results when examining a link between presidential quality and Supreme Court accomplishment. Regression analysis testing the relationship between the overall quality rankings of Supreme Court justices reveals no statistically significant relationship between justice quality and the rank of the appointing president. However, we do see that there is a negative relationship between the number of justices the appointing president has appointed and the rank of the justice (although this is almost exclusively caused by George Washington’s appointments). Interestingly, while the justice having served as Chief has no relationship with their overall quality ranking, *Republican justice* has a relationship with judicial quality; the Supreme Court justices identified by Abraham as Republicans are more likely to be highly ranked than those who are not. Whether this reflects a

bias among judicial scholars who rank the justices, or reflects a situation where Republican justices provide better jurisprudence is open for further discussion.

Next, I will test the three hypotheses by developing a regression model that accounts for potential impacts of several variables on the overall rank of Supreme Court justices. The dependent variable in Model 5.5 is *Overall justice rank*, which is the rank of the first 108 justices described previously. The most important independent variable in this study is *Appointing president overall quality rank*. This variable is determined by the rank each president has achieved in the *Overall presidential rank* described above, and that rank is recorded for each justice that president appoints to the Court. Hypothesis 1 posits that: The *Overall justice rank* will have a positive relationship with the *Appointing president's overall quality rank*.

Model 5.5 also makes use of several control variables. *Appointing president's total number of appointments* is included to control for the number of appointments that presidents have made as a potential impact on justice quality. Hypothesis 2 suggests that because presidents who make more appointments will have higher rated justices due to experience gained in navigating the process, and thus I expect a positive relationship between *Overall justice rank* and *Appointing president's total number of appointments*. I also account for the theory that the chief justices of the Court have been historically more highly regarded. This dichotomous variable, *Justice served as Chief*, is coded "1" if a justice has ever served as chief, "0" if they have not. Twelve of the 108 justices in this study served as chief, only 11.11 percent. Hypothesis 3 predicts that those who have served as chief will have a higher *Overall justice rank*.

Finally, I control for judicial ideology by testing the relationship between judicial quality and a justice's party allegiance. This variable is derived from the "justice nominal party

allegiance at appointment” measure as reported by Abraham (2008); it assigns a political party to each justice prior to their appointment. In this study, there are 43 justices that are Republican, 43 Democrats, 13 Federalists, 7 Democratic-Republicans, 1 Whig (Benjamin Curtis ) and 1 independent (Felix Frankfurter) (Abraham, 2008, 349-353). I measure this effect in my model with the variable *Republican justice*, a dichotomous variable coded “1” for justices who were aligned with Republican Party at time of appointment, and “0” for all others.

### *Model*

These variables lead to the following GLS random effects model:

#### Model 5.5:

$$Y (\text{Overall justice rank}) = x_1 (\text{Appointing president overall quality rank}) + x_2 (\text{Appointing president's total number of appointments}) + x_3 (\text{Justice served as Chief}) + x_4 (\text{Republican justice}) + u$$

Table 5.5 reports the results of this model. From these results, we must reject the first and third hypotheses—that there is a relationship between presidential quality and the quality of the Supreme Court justices they appoint; and that there is a greater likelihood that serving as Chief Justice will lead a justice to be rated higher. Yet, examination of this data also suggests a few ‘quick fixes’ that may allow us to capture the relationship in a more accurate way. Most paramount of these improvements is removing President George Washington and his appointments from the data. Theoretically, this is not a stretch, as Washington is ranked the overall top president in my data, yet his Supreme Court appointments are ranked so low. These

appointments are responsible for the observed relationship between judicial greatness and the number of appointments made by the appointing president of that justice being significant in a negative direction. Thus, the inverse of Hypothesis 2 is said to be correct. Interestingly, the Abraham party allegiance variable suggests that being a highly rated justice is positively associated with being a Republican justice.

Table 5.5: Regression analysis of Overall Quality Rank of Supreme Court Justices

	<i>Overall justice rank</i>
<i>Appointing president overall quality rank</i>	0.415 (.280)
<i>Appointing president number of appointments</i>	2.00** (1.33)
<i>Justice served as Chief</i>	-1.09 (9.23)
<i>Republican justice</i>	-2.80*** (6.23)
Constant	5.24*** (9.14)
Number of justices	108
R-squared	.1227
Standard errors in parentheses; *** p<0.01; ** p<0.05; *p<0.10	

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Few scholars would argue that the Supreme Court had developed any power as a political institution in the nation's incipient stages, thus the gulf between the ranking of Washington and those justices is producing an impact too large on the overall study than it actually permeated. Thus, a more accurate test of this relationship that I will use going forward in this work is an examination of all presidents except Washington, and all justices except his ten appointments.

The relationship of presidential quality and judicial quality of the most recent 43 presidents and 102 justices is considered in the following hypothesis:

*Hypothesis 4*

**H<sub>4</sub>**- *Justices rated in the top 25 percent of justices are more likely to have been appointed to the Court by presidents that are ranked in the top 10 (not counting Washington) than those justices who are rated in the bottom 75 percent of quality justices.*

In the following examination, I make use of the same measures and theories as previously discussed, with one exception: President George Washington and his 10 Supreme Court nominees have been removed. While the relationship between the executive and judicial branch has remained in flux through United States history, theoretically, no presidential-judicial relationship was more unique than that between Washington and those he appointed. This outlier is thus removed to allow a more accurate measure of the potential effect that great presidents have had on great justices.

Table 5.6 considers the case of the 102 justices appointed to the Court after Washington's tenure, up to and including Obamas recent appointments of Sotomayer and Kagan. It considers the top 10 presidents based on overall quality with Washington removed (those ranked 2-11 in Table 5.7). From this point forward in this work, I define "great" presidents as those that are ranked in the top 10 in terms of overall quality, minus Washington; and "great" justices as those ranked in the top 25 in overall quality as captured in Table 5.8. These figures allow for the most consistent measure between the two institutions, targeting the top 25 percent as from each institution as the unit of analysis. While these measures are of course arbitrary,

increasing these numbers any further would seem to fall outside the scope of the accepted meaning of the word “great;” meanwhile, lowering the percentage would decrease the raw number of presidents to the point that no meaningful conclusions could be observed based on such data.

Table 5.6: Top 25 Supreme Court Justices as Appointed by top 10 Presidents

	Not a top 25 Supreme Court justice	Top 25 Supreme Court Justice	Totals
Not appointed by a top 10 president	53 (69)	13 (52)	66 (65)
appointed by a top 10 president	24 (31)	12(48)	36 (35)
<b>Totals</b>	77	25	102

Chi square= 2.341,  $p= .126$ . Percentages in Parentheses.

Table 5.6 reveals a much stronger relationship between presidential quality and judicial quality than Model 5.5 suggests. Despite the top 10 presidents making only 36 of the 102 appointments in the data, 35.3 percent of the total appointments to the Supreme Court, 12 of the justice, 48 percent, of the justices ranked in the top 25 of my data were appointed by the great presidents. Interestingly, only 31.2 percent of the justices ranked outside of the top 25 were appointed by top 10 presidents. Meanwhile, 68.8 percent of the justices not ranked in the top 25 were appointed by presidents not in the top 10.

Table 5.6 also reveals that of all the appointments made by the top 10 presidents, a full 33.3 percent of them are rated as top 25 justices, while their appointments make up only 31.2

percent of all those justices not in the top 25. Meanwhile 66.7 percent of the appointments made by top 10 presidents are not top 25 justices, compared to 80.3 percent of those appointed by presidents not ranked in the top 10. The difference is statistically significant at the .10 probability level.

Table 5.6 suggests that there is a potential relationship between the quality of the appointing presidents and the quality of the justices they appoint. From this evidence, we can say there is support for Hypothesis 4. We see that the inverse of this hypothesis is true as well, in that those justices appointed by a top 10 president are less likely to be in the group of lower ranked justices than those who were not appointed by a top 10 president. In short, what this analysis finds is that there historically has been a relationship between presidential greatness and the quality of Supreme Court justices in the United States, once George Washington and his appointments are removed from consideration.

### *Conclusions*

This chapter serves as an introduction to the idea of reconciling the rankings used in evaluating great presidents and Supreme Court justices in the United States. Certainly, this is an early exploration. Yet there are some signs of a promising start. Focusing on the results presented in Table 5.6 the findings suggest that the top 10 presidents have appointed a larger share of top 25 justices than the averages would suggest they should have. Stated in its simplest form, half of the top justices were appointed by great presidents, while only 1/3 of justices were appointed by great presidents. The question that next develops from these findings is one that explores to what degree presidents are rated highly as a reflection of these quality appointments, or if great

presidents simply have a better ability to select those with a stronger penance for great jurisprudence.

More than providing a definite answer to the potential relationship, this study reveals multiple avenues for subsequent research on the topic. Future scholars may want to develop more scientific ratings systems for both presidents and justices. I would suggest applying Comiskey's approach to evaluating justices based on their contribution within their era. Still, to properly evaluate the two simultaneously, we must develop a mechanism that accounts for the relative strength of the judicial branch at the time of each appointment. The need for this measure is apparent in this research with the prescribed treatment of George Washington and his appointments to the high Court likely being less than ideal. Developing and including a measure of bench strength will be a major step in advancing this line of research.

In a broader sense, developing standardized criteria for the ranking of presidents and justices, as well as measures that account for other sources of political pressure at the time of all appointments, would allow for consideration of the impacts other actors have on judicial behaviors. Certain elements of such research, including congressional party make up (particularly concerning conditions of unified or divided government), are currently available for all appointments. Yet others—such as ideal point measures for institutional actors, public opinion polls, and justice ideology scores before appointment—do not exist for the majority of justices as these measures account for the modern Court predominately. It is the challenge for this author and others interested in determining the potential link between presidential greatness and great jurisprudence to develop these measures in the future.

Table 5.7: Overall Ranking of the Presidents

Rank	President	Supreme Court Appointments
1	Washington, George	10
2	Lincoln, Abraham	5
3	Roosevelt, Franklin	8
4	Roosevelt, Teddy	3
5	Jefferson, Thomas	3
6	Truman, Harry	4
7	Eisenhower, Dwight	5
8	Wilson, Woodrow	3
9	Kennedy, John F	2
10	Madison, James	2
11	Monroe, James	1
12	Jackson, Andrew	6
13	Johnson, Lynden	2
14	Adams, John	3
15	Polk, James K	2
16	Clinton, Bill	2
17	Reagan, Ronald	3
18	Adams, John Q	1
19	Cleveland, Grover	4
20	McKinley, William	1
21	Taft, William H	5
22	Bush, George HW	2
23	Ford, Gerald	1
24	Carter, Jimmy	0
25	Van Buren, Martin	2
26	Grant, Ulysses	4
27	Arthur, Chester A	2
28	Hoover, Herbert	2
29	Garfield, James	1
30	Coolidge, Calvin	1
31	Hayes, Rutherford B	2
32	Taylor, Zachery	0
33	Harrison, Benjamin	4
34	Nixon, Richard	4
35	Harrison, William H	0
36	Tyler, Zachery	1
37	Fillmore, Millard	1
38	Johnson, Andrew	0
39	Pierce, Franklin	1
40	Harding, Warren	4
41	Buchanan, James	1

Table 5.8: Overall Ranking of the Supreme Court Justices

Rank	Justice	Appointing President	Appointing President Rank
1	Black, Hugo	Roosevelt F	3
2	Holmes, Oliver W	Roosevelt T	3
3	Harlan, John MI	Hayes	32
4	Brennan, William J	Eisenhower	7
5	Douglas, William O	Roosevelt F	3
6	Stevens, John Paul	Ford	24
7	Rehnquist, William H	Nixon	35
8	Field, Stephen	Lincoln	2
9	Frankfurter, Felix	Roosevelt F	3
10	Blackmun, Harry A	Nixon	35
11	Brandeis, Louis D	Wilson	8
12	White, Edward D	Cleveland	20
13	Stone, Harlan F	Coolidge	31
14	Miller, Samuel F	Lincoln	2
15	Marshall, John	Adams J	14
16	Hughes, Charles	Taft	22
17	O'Connor, Sandra Day	Reagan	18
18	Warren, Earl	Eisenhower	7
19	Taney, Roger B	Jackson	12
20	Story, Joseph	Madison	10
21	Harlan, John MII	Eisenhower	7
22	Powell, Lewis F	Nixon	35
23	White, Byron	Kennedy	9
24	Scalia, Antonin	Reagan	18
25	Bradley, Joseph P	Grant	27
26	Burger, Warren E	Nixon	35
27	Marshall, Thurgood	Johnson LB	13
28	Stewart, Potter	Eisenhower	7
29	Souter, David	Bush GHW	23
30	Jackson, Robert H	Roosevelt F	3
31	Ginsburg, Ruth B	Clinton	17
32	Johnson, William	Jefferson	5
33	McKenna, Joseph	McKinley	21
34	Kennedy, Anthony	Reagan	18
35	Cardozo, Benjamin	Hoover	29
36	Sutherland, George	Harding	42
37	Breyer, Stephen	Clinton	17
38	Taft, William H	Harding	42
39	Waite, Morrison R	Grant	27
40	Fuller, Melville	Cleveland	20
41	Reed, Stanley	Roosevelt F	3
42	Clark, Tom C	Truman	6
43	McLean, John	Jackson	12

Rank	Justice	Appointing President	Appointing President Rank
44	Brewer, David J	Harrison B	34
45	Day, William	Roosevelt T	4
46	Catron, John	Jackson	12
47	Gray, Horace	Arthur	28
48	Clifford, Nathan	Buchanan	43
49	Wayne, James M	Jackson	12
50	Roberts, Owen J	Hoover	29
51	Nelson, Samuel	Tyler	38
52	Thomas, Clarence	Bush, GHW	23
53	Washington, Bushrod	Adams J	14
54	Rutledge, Wiley	Roosevelt F	3
55	Van Devanter, Willis	Taft	22
56	McReynolds, James C	Wilson	8
57	Murphy, Frank	Roosevelt F	3
58	Grier, Robert C	Polk	16
59	Brown, Henry B	Harrison B	34
60	Swayne, Noah h	Lincoln	2
61	Fortas, Abe	Johnson, LB	13
62	Pitney, Mahlon	Taft	22
63	Butler, Pierce	Harding	42
64	Blatchford, Samuel	Arthur	28
65	Duvall, Gabriel	Madison	10
66	Thompson, Smith	Monroe	11
67	Peckham, Rufus w	Cleveland	20
68	Daniel, Peter V	Van Buren	26
69	Sanford, Edward T	Harding	42
70	Burton, Harold	Truman	6
71	Davis, David	Lincoln	2
72	Goldberg, Arthur	Kennedy	9
73	Strong, William	Grant	27
74	Curtis, Benjamin	Fillmore	39
75	Cushing, William	Washington	1
76	Chase, Salmon P	Lincoln	2
77	Clarke, John H	Wilson	8
78	Shiras, George	Harrison B	34
79	Chase, Samuel	Washington	1
80	Matthews, Stanley	Garfield	30
81	Todd, Thomas	Jefferson	5
82	Lamar, Joseph	Taft	22
83	Hunt, Ward	Grant	27
84	Vinson, Fred	Truman	6
85	Livingston, Henry B	Jefferson	4
86	McKinley, John	Van Buren	26
87	Moody, William H	Roosevelt T	4
88	Paterson, William	Washington	1
89	Baldwin, Henry	Jackson	12

Rank	Justice	Appointing President	Appointing President Rank
90	Lurton, Horace	Taft	22
91	Campbell, John A	Pierce	41
92	Minton, Sherman	Truman	6
93	Lamar, Lucius	Cleveland	20
94	Wilson, John	Washington	1
95	Iredell, James	Washington	1
96	Woodbury, Levi	Polk	16
97	Whittaker, Charles	Eisenhower	7
98	Jay, John	Washington	1
99	Woods, William B	Hayes	32
100	Blair, John, Jr.	Washington	1
101	Byrnes, James F	Roosevelt F	3
102	Ellsworth, Oliver	Washington	1
103	Rutledge, john	Washington	1
104	Jackson, Howell E	Harrison B	34
105	Barbour, Philip	Jackson	12
106	Moore, Alfred	Adams J	14
107	Trimble, Robert	Adams, JQ	19
108	Johnson, Thomas	Washington	1

Table 5.9: Average Supreme Court Justice Ranking by Appointing President

Appointer Rank	President	Average Justice Rank	# of Appointments
1	Ford, Gerald	6	1
2	Coolidge, Calvin	13	1
3	Nixon, Richard	16.25	4
4	Reagan, Ronald	25	3
5	McKinley, William	33	1
6	Eisenhower, Dwight	33.6	5
7	Clinton, Bill	34	2
8	Roosevelt, Franklin	37.25	8
9	Bush, GHW	40.5	2
10	Madison, James	42.5	2
11	Hoover, Herbert	42.5	2
12	Johnson, LB	44	2
13	Roosevelt, Teddy	44.67	3
14	Lincoln, Abe	45.8	5
15	Kennedy, John F	47.5	2
16	Wilson, Woodrow	48	3
17	Buchanan, James	48	1
18	Hayes, Rutherford B	51	2
19	Tyler, Zachery	51	1
20	Harding, Warren	51.5	4
21	Cleveland, Grover	53	4
22	Grant, Ulysses	55	4
23	Arthur, Chester A	55.5	2
24	Adams, John	58	3
25	Jackson, Andrew	58.5	6
26	Taft, William H	61	5
27	Jefferson, Thomas	66	3
28	Monroe, James	66	1
29	Harrison, Benjamin	71.25	4
30	Truman, Harry	72	4
31	Fillmore, Millard	74	1
32	Polk, James K	77	2
33	Van Buren, Martin	77	2
34	Garfield, James	80	1
35	Pierce, Franklin	91	1
36	Washington, George	94.2	10
37	Adams, John Q	107	1



## V I . C o n c l u d i n g T h o u g h t s

The research presented in this dissertation has been geared toward answering Maveety's (2004) call for a theory of judicial behavior that is inclusive of aspects from each of the major approaches. By incorporating tenets of multiple major approaches to the study of judicial behavior, I have presented substantial evidence about the relationship between Supreme Court justices and other political actors. This research serves the goal of increasing our understanding of these complex interactions by making use of improved measures of actor preferences and methodological techniques. In determining what factors affect Supreme Court justices' voting decisions, I was determined to include measures that accounted for judicial preferences, the influence of Congress, the role of the president, internal-Court bargaining, justice's pre-confirmation characteristics, and public preferences. This work accounted for the importance of each of these potential influences on justice preferences, but highlights most prominently the importance of justice ideology, the ideal point of the appointing president, and ultimately, time served on the bench.

By making use of a unique dependent variable—*Yearly Supreme Court justice ideal point*, calculated by Michael A. Bailey of Georgetown University—my empirical models isolated the effects of numerous independent variables. In designing and testing my models, I was able to account for multiple approaches used to study judicial behavior. Yet, ultimately, I focused specifically on the theory of new institutionalism—an approach to the study of judicial politics that emphasizes the influence of external, non-judicial political actors on judicial behavior. My findings have many implications for larger theoretical concerns of political science, specifically questions about the independence of the judiciary and the effectiveness of the separation of powers formula prevalent in democratic theory.

### *The Major Research Questions*

Based on previous research, I proceeded from the belief that Supreme Court justices do in fact change their voting behavior over time. Using the data in this research, I was able to reaffirm this conclusion with superior measures, and was able to expand this line of research by addressing the question of *why* their voting behavior changes. Ultimately, it was revealed that while justice voting does change, the change is more a function of time than other influences.

By addressing what factors affect Supreme Court justices' voting decisions I made use of a precise measure of judicial behavior as my primary dependent variable—*Yearly Supreme Court justice ideal point*. Indeed, one of the foremost contributions of this study is that it uses this novel dependent variable to model judicial decision-making. I expand the field beyond examining just the relationship of the president and Congress with Supreme Court justices to explore how the behavior of other Supreme Court justices affects the behavior of individual justices in order to consider factors highlighted by strategic theories of judicial decision-making. I also examined political phenomena such as public opinion and presidential approval. My consideration of these factors illuminates the nature of the relationships between the judicial branch and other political actors.

I created an additional dependent variable called “drift.” This variable tracks changes in yearly justice ideal points over time. I made use of this variable in Chapter 4 to demonstrate the effect of changing political environments on the ideological relationship between a justice and the president who appointed him/her. In addressing this question, I reached conclusions about the nature of this relationship and how it is affected by previous office positions held by the justices,

the perceived quality of the justice before their appointment, and other pre-confirmation characteristics of justices.

In the end, I hope that this research has increased the understanding of the variety of factors that affect Supreme Court justice behavior. I feel that I have been successful in this endeavor. While no doubt falling short of producing a model that can predict justice voting behavior with 100% accuracy, my models have revealed much about the relationship between justices and other political actors. The findings herein describe the justices as actors who are true to their ideological preferences for the most part, but who are constrained by pressures from Congress, the president, and their peers on the Court. I also attempted to further the line of research beyond yearly examination to account for the relationship between justices and presidents over the course of their entire tenure on the Court. In doing this, I reveal the nature of the relationship between justices and their appointers that is missed when only yearly data is considered.

### *Important Findings from Chapter 3*

None of the models in Chapter 3 are likely to serve as *the* model of Supreme Court voting behavior that Maveety (2004) desired. Yet several of them are a step in that direction, and they certainly are more inclusive of aspects from each approach than many previous works have produced. The findings in Chapter 3 further the prevailing notion of the attitudinal model that “attitudes matter.” I should expound upon this finding a bit further, to be clear, the findings in this dissertation suggest that there are some institutional constraints on justice voting behavior, yet these findings that support the new institutionalism lack consistency as Chapter 4 reveals.

The ideological preferences of justices as measured through their *Segal/Cover ideology score* are associated with Supreme Court voting behavior consistently throughout this work. The attitudinal model remains a dynamic force in the explanation and prediction of justice decision-making. Along these lines, the evidence offered in Table 3.1 demonstrates a strong relationship between judicial preferences once on the Court and ideological positions prior to confirmation. Yet I also find that there is a link between the ideological leanings of the other institutions of government and the preferences of Supreme Court justices.

I find a strong positive relationship between the ideological median of Congress in a given year and the ideology score of justices during the same term. This finding provides robustness to previous studies that have suggested that there is a strong link between the two. The findings in Chapter 3 of a negative relationship between the sitting president and yearly justice behavior are contradictory to my expectations and previous literature (Martin, 2006). It was my expectation that just as with Congress, the justices in this study would behave ideologically in a manner that paralleled the preferences of the current president. This was not the case in Model 3.1. Perhaps it is the case that individual presidents are too unique and isolated in their positions to have an impact on life-tenured actors whom they have not appointed.

Also in Model 3.1, I note no significant findings for the rational choice approach, as there was no observed relationship between justices and the yearly Supreme Court median initially. Yet to account for the type of intra-court bargaining that Epstein and Knight (2004) and Hammond et al. (2006) describe as essential in the Supreme Court decision-making process, I made the methodological adjustments to previous studies that allow for the ideological

relationship between Supreme Court justices and the other justices serving on the court at the same time to be captured in Model 3.2.

Overall, Model 3.2 produces strong results regarding the relationship between a justice's voting behavior and the median ideology score for the other justices serving on the Court at the time a decision is made. Justice ideal point data reveal a significant negative relationship between a justice's voting score and the voting scores for all other justices serving on the Court during the same term. My findings here suggest that justices are indeed affected by those serving with them, but are not necessarily inclined to conform perfectly to their preferences.

The findings from Model 3.2 add to the public law literature that explores how changes in the Court's membership (which alters the median and justice independent median) and justices' reactions to the preferences of their colleagues can have dramatic effects on the Court's outputs. Consistent with my other findings, Model 3.2 provides evidence that justices' pre-confirmation attitudes, as measured by Segal/Cover scores, are extremely relevant for explaining their voting behavior. Chapter 3 also accounts for the *Filibuster pivot ideology score*, which suggests that congressional ideology is correlated with judicial voting behavior, a finding which may mean that justices act strategically in anticipating congressional reactions to their decisions.

Model 3.3 was concerned with the relationship between the career voting positions of Supreme Court justices and their appointing president. I explored this more precise measure of the relationship between appointing presidents and the career voting of Supreme Court justices because it offers a good measure of the long term policy impact presidents hope to have on the Court through their appointments. The results of Model 3.3 demonstrate that presidents have for the most part appointed like-minded justices to the Supreme Court. Interestingly, the control

variables included in Model 3.3 show no relationship to the career voting scores of justices; this indicates the strength of the long-term bond between justices and their appointing president.

In terms of president-specific results there are several differences between my work and that of Segal et al. (2000). While both studies rank Bill Clinton as the top president at appointing like-minded justices, and both have Johnson, Kennedy and Ford ranked in the bottom tier, the rankings of Reagan and George H.W. Bush are noticeably different. They were ranked second and third, respectively, in the previous study, yet Table 3.4 lists Reagan fifth and Bush second from the bottom. The explanation for this slide of these two conservative presidents is most likely the increased liberal voting of justices Kennedy and O’Conner which impacted Reagan’s rank, and the strong liberal voting of David Souter. These differences highlight two important aspects of an undertaking such as this—the fluidity of judicial voting behavior, and the importance of considering appointments as long term political phenomena.

Chapter 3 reveals much about the nature of judicial voting behavior. In addition to finding consistent support for the attitudinal model, while making use of panel data, I find support for new institutionalism, observing an ideological relationship between Congress and the president and Supreme Court justice voting outputs. Next, I discovered that the rational choice approach to judicial politics has merit as well, as there is a strong relationship between the preferences of the other justices on the Court and each individual justice’s behavior. This finding makes an interesting addition to the judicial bargaining literature by showing that the direction of this relationship is counterintuitive. Finally, I found that when career data is considered there is a strong positive relationship between the ideology of Supreme Court justices and the preferences of their appointing president.

#### *Important Findings from Chapter 4*

The findings in Chapter 4 highlight the various appointment conditions that can constrain a president's ability to appoint a justice with similar ideological preferences. Not surprisingly, it appears that a justice who is appointed to replace a justice of similar ideology is less likely to distance him/herself from his/her appointing president. Similarly, the justices in my study who are appointed when there is divided government drift less than those appointed under conditions of unified government. Perhaps most interestingly, I found that justices who are thought to be of the highest quality before reaching the Court are more stable in their preferences over time, while those justices who are thought to be less qualified behave with less consistency. Chapter 4 offers consistent support for scholars of the new institutionalism who posit that other political institutions and actors affect the voting behavior of Supreme Court justices. I say this because of the significance of *Congress median* and *Yearly presidential ideal point* in Model 4.1.

In Model 4.2, I discovered two other variables that impact the ideological distance between a Supreme Court justice and the president that appointed him/her. First, qualification of an individual justice was found to be related to ideological distance from the appointing president in a negative direction. Justices with a larger degree of ideological disagreement with their appointer were perceived to be less qualified by Segal and Cover. Second, I was able to show the impact of having elected office experience on the ideological distance between justices and their appointing president. Yet the direction was different than hypothesized. Justices who have previously won elections are more likely to distance themselves ideologically from their appointing president.

While the divided government variable showed no relationship with *Justice career distance score* in Model 4.2, in Model 4.3 the ideal point representation of Congress and the Court has a statistically significant impact on ideological distance. This finding is consistent with results of previous new institutionalism studies. The uniqueness of this finding is based on the different ideological direction each institution shifts towards as *Justice yearly distance score* increases. I find that justices are ideologically closer to their appointing president as the Congress becomes more conservative, but that the distance is increased when the Supreme Court as an institution becomes more conservative. Reconciling this particular finding is a component of my future research agenda.

Furthermore, when presidential approval ratings are used as the measure of a president's political capital, no relationship is observed between ideological differences between justices and their appointing presidents. Other measures of political capital were examined in both models as well, and none suggested a statistically significant relationship between presidential popularity and the ideological distance between Supreme Court justices and the presidents who appoint them. Future studies of the effects of presidential approval may show a significant impact on judicial voting behavior, but here I find no evidence of such impact. In the end, my research fails to fully embrace the view of Epstein et al. (2007), who claim that because presidents cannot accurately predict future judicial activity they should appoint individuals who satisfy their constituent base. What Chapter 4 reveals is that in terms of ideological distance from the president, there are ways to anticipate potential judicial ideological drift, and that those with increased judicial qualifications will remain tethered more closely to their appointer, while those who previously held office will distance themselves during their tenure on the bench.

In Chapter 3, I reported a high level of congruity between presidents' Bailey ideal point scores and career ideal point scores for their Supreme Court appointments. In Chapter 4, I expanded on that finding by examining the degree to which justices distance themselves from the preferences of their appointing president with each additional term served. In summary, a justice is more likely to vote in alignment with the ideology of his/her appointing president earlier in his/her tenure on the Court than later. This finding holds when I control for other factors that might affect judicial voting scores. My findings are relevant to scholars concerned with notions of the judicial "acclimation effect" or those interested in the ability of appointing presidents to see their ideology appear in the voting behavior of their Court appointments. Model 4.4 describes a process in which justices advance toward increased independence with each term served on the Court. This updates the work of authors like Hurwitz and Stefko (2004) by revealing that judicial drift appears to be a nearly linear process. Consistent with the other findings in this dissertation, this result highlights the need for judicial scholars to account for the relevant contributions from each approach in the search for a more comprehensive theory of the link between the voting behavior of Supreme Court justices and the presidents who appoint them.

#### *Important Findings from Chapter 5*

Chapter 5 focused on linking the rankings used in evaluating United States presidents and Supreme Court justices. There are some indications that this research is off to a promising start. I found that the top 10 presidents have appointed a larger share of top 25 justices than the averages would suggest they should have. In short, half of the top justices were appointed by great

presidents, while only 1/3 of justices were appointed by great presidents. The question that next develops from these findings is one that explores whether presidents are rated highly as a reflection of these (and other) quality appointments, or if great presidents simply have a better ability to select those with a greater penchant for great jurisprudence.

In a broader sense, developing standardized criteria for the ranking of presidents and justices would allow for consideration of the impact of other actors on judicial behavior, and allow this line of research to expand methodologically and theoretically. Ideal point measures for institutional actors, public opinion polls, and justice ideology scores before appointment, do not exist for the majority of Supreme Court justices. It is my goal to develop these measures in the future.

### *Relevance to the Discipline*

The findings of this work are not counter to those of scholars such as Moraski (1999), who finds a strong relationship between justices and their appointing president. This is observed throughout the justice's life tenured career. Theoretically, there is good reason for the ideological link between a Supreme Court justice and his/her appointing president. This relationship is established by the institutional rules of the judicial selection process. Perhaps most interestingly for those who study political interactions in general, in several of my models the yearly ideal point from the office of the president also has an effect on judicial preferences. The implication of this observation is that justices are not only influenced by the ideology of the president who appointed them, but also are responsive to the executive who currently fills the oval office as

well. This finding has broad relevance for scholars of the Court, the presidency, and American institutions in general.

By making use of the Bailey ideal points, this work provides an examination of judicial behavior theories with ideological scores that offer increased validity when compared to some previous explorations of the same questions. Bailey's scores offer measures of actor preferences that are comparable across time and institutions, and are thus uniquely situated to be of use for this research. It is my hope that the findings herein will encourage others to make use of the Bailey ideal points.

Overall, this dissertation provides a contribution to the field of public law in two specific ways. First, I address questions about Supreme Court voting behavior with superior data and measures. Findings that are consistent with previous works provide robustness for that research. Second, I employ several new variables that can be used to study the Court. Specifically, I deploy *Justice-independent Court median* to explore intra-Court relationships, and to explore the effects of institutional variables I feature the various distances from filibuster pivot scores produced by Hemant Sharma. Each of these variables offers an improved measure, and I hope that other scholars will consider using these unique variables in their own work.

#### *Future Implications and Suggestions for Future Research*

I must concede that further study of the relationship between Supreme Court justices and their institutional environment and political constraints is necessary. Still to be determined is whether or not Supreme Court justices are following the ideological lead from Congress, the president, or the public, or whether each of the institutions is simply reflecting the ebbs and flows of the

nation's drifting policy mood at any given moment. A correlation analysis between the public policy mood as reported by James Stimson (1999, updated online 2011) and Supreme Court decision-making suggests that this second conclusion remains a possibility. Future research into the ideological relationship between justices and Congress needs to be cognizant of the potential impact of public mood on institutions, and needs to develop controls for the reciprocal nature of these relationships.

In furthering rational choice research on the Court, it appears it would be wise to acknowledge the possibility that justices might only engage in strategic behavior in certain issue areas. Preliminary findings when the focus is narrowed to issue-specific case analysis finds evidence that justices do in fact mirror the tendencies of their colleagues in some types of cases (Sharma and Glennon, 2010). Thus, future research using the bargaining approach should account for various voting differences in unique issue areas where possible. The development of issue-specific ideal points may be an important step in this direction. Future research may also wish to assess the rational choice approach in "close votes" (5-4 decisions) where it seems beneficial for justices to behave strategically.

One of the more interesting findings in this work was the strong link between increasing conservatism in political institutions and a decrease in justice drift from appointing president's preferences. The results of Model 4.1 illustrate that both liberal and conservative leaning justices aligned themselves more closely to the ideology of the appointer when Congress behaved more conservatively, the implication being that conservative cues from other institutions return judges to their original ideological positions, while liberal cues from Congress signal to Supreme Court justices an opportunity to "drift" from their initial ideal point. This finding is one that has far

reaching implications for political scientists and certainly requires elaboration in subsequent studies.

Additionally in Chapter 4, I observed that elected office experience was related to increasing the distance between a justice and his/her appointer. This finding has interesting implications for the literature on judicial role orientations, specifically as it regards the connection between elected office experience and a justice's conception of the proper actions of a Supreme Court justice. Future research may wish to further examine this phenomenon as well.

As mentioned previously, I also found that justices are ideologically closer to their appointing president as the Congress becomes more conservative. But conversely, I found that this ideological distance is increased when the Supreme Court as an institution becomes more conservative. Reconciling this particular finding is the next step in this specific research. Judicial scholars should aim to develop research that accounts for directional ideological differences in the "drift" of justices. If the same seemingly contradictory result is still observed, further examination of institutional arraignments will be required.

Based on the findings in Chapter 5, future scholars will first need to develop more scientific ratings systems for all presidents and justices. I would suggest applying Comiskey's approach to evaluating justices based on their contribution within their era. Still, to properly evaluate the two simultaneously we must develop a mechanism that accounts for the relative strength of the judicial branch at the time of each appointment. The need for this measure is apparent in this research with the treatment of George Washington and his appointments to the high Court likely being less than ideal. Developing and including a measure of bench strength will be a major step in advancing this line of research.

Larger issues that remain tangled include: the justice's responsiveness to public opinion (Do judges reflect it or shape it?), the issue of case salience (Does the public care about issues where they anticipate a controversial ruling? or Does a controversial ruling cause salience?), the role of the legislative branch in the process of confirmation (Who is on the court?), and how judicial preferences are affected by the congressional constraint (once they are serving). Answering these questions, particularly the ideological directional question, remains a challenge for judicial scholars in light of many contemporary findings.

### *Concluding Thoughts*

Court observers have always been fascinated by the process through which Supreme Court justices make the choices they do; it is a process that we know relatively little about. A lot of the knowledge that scholars have acquired comes from the private papers of justices released long after they have left the bench. While these direct sources no doubt provide a valuable insight into the process, they are far from perfect data for use in empirical research. In light of this fact, and perhaps because of it, public law scholars have remained curious as to how Supreme Court justices make the decisions that they do. Institutional protections, most importantly the lifetime appointment, seemingly shield justices from political consequences of their voting actions. Because this narrative is repeated each time the Court arrives at a controversial outcome, theories such as the attitudinal model that suggest the justices are simply voting their ideological preferences are well-received.

Yet most research into the matter has revealed that this is not the entire story. Justices take into account other factors when making choices on the bench. This research joins countless

others in attempting to clarify just what it is that they are considering beyond their ideological predispositions. The results are important for those who are interested in the ideals of judicial independence, or more broadly, separation of powers in American government. Those who favor strong judicial independence would be troubled by the links between the ideological preferences of other institutions and the Court itself. Yet ironically, it may be the case that the separation of powers is uniquely responsible for such an arraignment. Because the justices know that they do not in fact act in a vacuum, that Congress has significant powers to counter unpopular decisions, and that the executive branch must enforce its decisions, they must act to various degrees in anticipation of the preferences of these other institutional actors. These institutional constraints are exactly what scholars who favor the new institutionalism approach posit are relevant in affecting judicial voting behavior.

Overall, this work furthers the new institutionalism approach to judicial behavior by examining the effect of outside actors on justices' voting behavior. This work demonstrates a strong link between the ideological preferences of Supreme Court justices over the course of their tenure on the Court and their appointing president, as well as a yearly relationship between Congress and Supreme Court ideological preferences. I also find countless institutional factors at the time of an appointment that affect the ideological distance between presidents and the justices they appoint. Nonetheless, I am not singularly beholden to the approach of new institutionalism. I also find support that justices will perform consistent with their pre-conformation ideological leanings, an observation that clearly supports elements of the attitudinal model as well. And through use of *Justice-independent Court median*, I find strong support for the bargaining approach by observing a significant negative relationship between

other justices on the Court and a justice ideal point. I hope that others in the field can similarly embrace the new institutionalism, which continues to enjoy empirical success, while not ignoring the important aspects of other approaches. I believe that by accounting for each of the approaches championed herein and by continuing to improve upon the measures that we use to explore institutional relationships between the Supreme Court and other political actors, scholars of judicial politics will move closer to developing an inclusive model of Supreme Court decision-making.

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## Vita

Colin Glennon is a 2004 graduate of the University of Missouri, where he received B. A. degrees in Political Science and History. At Mizzou, he was a member of the Dean's list while serving as the Grand Pooh-Bah of the Antlers. It was in Columbia where Colin was introduced to the study of Supreme Court justice voting behavior by Dr. Richard Hardy and where he met Justice Antonin Scalia, Coach Gary Pinkel and Devin Roundtree. He arrived in Knoxville, Tennessee in the fall of 2006, and has served as President of the Political Science Graduate Student Association, as a Senator in the University of Tennessee Graduate Student Senate, and was also a member of the Graduate Travel Fund Awards Committee. He also served as a tutor at the Thornton Athletic Student Life Center, and as a judge for the Ronald McNair Scholars Program. In 2009 Colin passed comprehensive exams in American Government and Politics and Public Administration. He was the 2010 recipient of the John Shanks Award for Excellence in American Politics Research, and in 2011 was an Omicron Delta Kappa faculty appreciation award recipient. He completed his PhD in Political Science in 2011.